Supreme Court, U.S.
FILED
JUN 30 1992
OFFICE OF THE CLERK

No. 92-29

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

HAROLD E. FORD, *et al.*,
Petitioners,

v.

UNITED STATES and
THE HONORABLE JUDGE ODELL HORTON,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

WILLIAM E. McDANIELS *
PAUL MOGIN
THOMAS M. PATTON
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000
Counsel for Petitioner
Harold E. Ford

*Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Where the three factors enumerated in Fed. R. Crim. P. 18 dictate that a trial be held in one division of a judicial district, may a court hold all or part of the trial in another division based on a factor nowhere mentioned in Rule 18?

2. Do the Fifth and Sixth Amendments to the Constitution prohibit a federal court from transferring a case from one division to another based on a conclusion that black residents of the transferor division cannot serve as fair and impartial jurors?

3. Does the rule precluding jurors from testifying about statements made during deliberations or about their mental processes (Fed. R. Evid. 606(b)) apply to testimony concerning deliberations that ended with a hung jury?

4. Is a petition for mandamus a proper vehicle for challenging a transfer that is contrary to law?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. The Government's Initial Efforts To Avoid a Trial in Memphis	3
B. The First Trial	6
C. The Government's Efforts To Ensure That the Retrial Would Not Be in Memphis	7
D. The Court of Appeals's Decision	12
REASONS FOR GRANTING THE WRIT	13
I. THE COURT OF APPEALS'S DECISION IS CONTRARY TO THE EXPRESS COMMAND OF RULE 18 THAT THE PLACE OF TRIAL WITHIN THE DISTRICT SHALL BE FIXED "WITH DUE REGARD TO THE CONVENIENCE OF THE DEFENDANT AND THE WITNESSES AND THE PROMPT ADMINISTRATION OF JUSTICE"	13
II. THE COURT OF APPEALS'S DECISION IS CONTRARY TO THE PRINCIPLE ESTABLISHED IN *BATSON v. KENTUCKY*	18

TABLE OF CONTENTS—Continued

Page

III. FEDERAL RULE OF EVIDENCE 606(b) PROTECTS THE DELIBERATIVE PROCESS OF THE JURY WHETHER OR NOT THE JURY ULTIMATELY REACHES A VERDICT 24

IV. THE COURT OF APPEALS'S RULING THAT A TRANSFER ORDER CANNOT BE CHALLENGED THROUGH A PETITION FOR MANDAMUS IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS 25

CONCLUSION 27

APPENDIX

TABLE OF AUTHORITIES

CASES

	Page
Ballard v. *United States*, 329 U.S. 187 (1946)	24
Batson v. *Kentucky*, 476 U.S. 79 (1986)	*passim*
Beacon Theatres, Inc. v. *Westover*, 359 U.S. 500 (1959)	26
Brown v. *North Carolina*, 479 U.S. 940 (1986)	23
Dupoint v. *United States*, 388 F.2d 39 (5th Cir. 1967)	14, 15, 16, 17
Edmonson v. *Leesville Concrete Co.*, 111 S. Ct. 2077 (1991)	19
Ford v. *Georgia*, 111 S. Ct. 850 (1991)	19
Gannett Co. v. *DePasquale*, 443 U.S. 368 (1976)	14
Garland v. *State*, 367 A.2d 30 (Md. App. 1976)	21
Georgia v. *McCollum*, 60 U.S.L.W. 4574 (U.S. June 18, 1992)	19, 23, 24
Hernandez v. *New York*, 111 S. Ct. 1859 (1991)	19
Holland v. *Illinois*, 493 U.S. 474 (1990)	19
Hustler Magazine Inc. v. *U.S. Dist. Court for Dist. of Wyoming*, 790 F.2d 69 (10th Cir. 1986)	26
In re Chesson, 897 F.2d 156 (5th Cir. 1990)	16
In re McDonnell-Douglas Corp., 647 F.2d 515 (5th Cir. 1981)	26
In re Scott, 709 F.2d 717 (D.C. Cir. 1983)	26
In re Union Nacional de Trabajadores, 502 F.2d 113 (1st Cir. 1974), *vacated on rehearing*, 527 F.2d 602 (1st Cir. 1975)	26
Jones v. *Gasch*, 404 F.2d 1231 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 129 (1968)	17, 26
La Buy v. *Howes Leather Co.*, 352 U.S. 249 (1957)	26
Mallett v. *Missouri*, 494 U.S. 1009 (1990)	21
McDonough Power Equipment Co. v. *Greenwood*, 464 U.S. 548 (1984)	22
McKay v. *Raines*, 405 F. Supp. 363 (D. Kan. 1975)	25
Minnesota Mining & Manufacturing Co. v. *Platt*, 314 F.2d 369 (7th Cir. 1963), *vacated*, 376 U.S. 240 (1964)	26
New Mexico v. *Castrillo*, 566 P.2d 1146 (N.M. 1977)	25

TABLE OF AUTHORITIES—Continued

	Page
Person v. *Miller*, 854 F.2d 656 (4th Cir. 1988)	21
Platt v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240 (1964)	4, 14, 16, 17
Powers v. *Ohio*, 111 S. Ct. 1364 (1991)	19, 21
Rose v. *Mitchell*, 443 U.S. 545 (1979)	20, 21
Sheppard v. *Maxwell*, 384 U.S. 333 (1966)	14
Strauder v. *West Virginia*, 100 U.S. 303 (1880)	21
Sunshine Beauty Supplies, Inc. v. *U.S. Dist. Court for Central Dist. of California*, 872 F.2d 310 (9th Cir. 1989)	26
Swain v. *Alabama*, 380 U.S. 202 (1965)	21
Tanner v. *United States*, 483 U.S. 107 (1987)	25
Taylor v. *Louisiana*, 419 U.S. 522 (1975)	12, 22
Thiel v. *Southern Pacific Co.*, 328 U.S. 217 (1946)	24
Trevino v. *Texas*, 112 S. Ct. 1547 (1992)	19
United States v. *Anderson*, 328 U.S. 699 (1946)	14
United States v. *Balistrieri*, 778 F.2d 1226 (7th Cir. 1985), *cert. denied*, 477 U.S. 908 (1986)	18
United States v. *Burns*, 662 F.2d 1378 (11th Cir. 1981)	16
United States v. *Cates*, 485 F.2d 26 (1st Cir. 1974)	17, 18
United States v. *Dickie*, 775 F.2d 607 (5th Cir. 1985)	16, 17
United States v. *Fernandez*, 480 F.2d 726 (2d Cir. 1973)	15, 16, 18
United States v. *Ford*, 830 F.2d 596 (6th Cir. 1987)	5
United States v. *James*, 528 F.2d 999 (5th Cir. 1976)	14
United States v. *Mabry*, 809 F.2d 671 (10th Cir. 1987)	14
United States v. *MacQueen*, 596 F.2d 76 (2d Cir. 1979)	25
United States v. *Salamone*, 800 F.2d 1216 (3d Cir. 1986)	24
Will v. *United States*, 389 U.S. 90 (1967)	27

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS	Page
United States Constitution, Fifth Amendment	2
Sixth Amendment	2
Fourteenth Amendment	2
STATUTES	
18 U.S.C. § 371	4
18 U.S.C. § 656	4
18 U.S.C. § 1341	4
28 U.S.C. § 123(a) (1)	4
28 U.S.C. § 123(c) (2)	3
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1651(a)	3
Jury Selection and Service Act, 28 U.S.C. § 1861 *et seq.*	12, 17, 18
28 U.S.C. § 1861	17
28 U.S.C. § 1863(a)	17
28 U.S.C. § 1866(c)	17
Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.*	15
RULES	
Fed. R. Crim. P. 18	*passim*
Fed. R. Crim. P. 21	4, 5, 16, 17
Fed. R. Evid. 606(b)	3, 24, 25
MISCELLANEOUS	
ABA, Standards for Criminal Justice (3d ed. 1992)	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. ———

HAROLD E. FORD, *et al.*,
Petitioners,

v.

UNITED STATES and
THE HONORABLE JUDGE ODELL HORTON,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners Harold E. Ford, Douglas R. Beaty, Karl A. Schledwitz, and David A. Crabtree pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on March 2, 1992.[1]

OPINIONS BELOW

The opinion of the Court of Appeals, which is unreported, is set forth at A. 1a-14a.[2] The opinion of the

---

[1] Petitioners Beaty, Schledwitz, and Crabtree are represented by Herbert S. Moncier, Esq., Kemper S. Durand, Esq., and A. Philip Lomonaco, Esq., respectively.

[2] References to "A." are to the appendix to this petition.

District Court, which is also unreported, is set forth at A. 15a-37a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1992. A timely petition for rehearing with suggestion for rehearing *en banc* was filed on March 16, 1992 and was denied by the Court of Appeals on April 24, 1992. A. 38a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 18 of the Federal Rules of Criminal Procedure provides:

> Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due

regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

Rule 606(b) of the Federal Rules of Evidence provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the jurors to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Title 28, section 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

A. The Government's Initial Efforts To Avoid a Trial in Memphis.

Petitioner Harold E. Ford has been a United States Congressman serving Memphis, Tennessee since 1974. Beginning in 1984, a federal grand jury sitting in Memphis investigated possible charges against Ford and others. Memphis is located in the Western Division of the Western District of Tennessee. 28 U.S.C. § 123(c)(2). Forty percent of the population of that Division is black,[3] as is Ford.

---

[3] Affidavit of A. Elliot Smyth ¶ 6 (Dec. 14, 1989) (describing census data).

After a three-year grand jury investigation in Memphis, the government chose to leave Memphis on the eve of indictment and seek the indictment from a grand jury in Knoxville, which is located in the Northern Division of the Eastern District of Tennessee, 28 U.S.C. § 123(a)(1).[4] Only five percent of the population of that Division is black.[5] On April 24, 1987, an indictment was returned in Knoxville charging Ford and four co-defendants with violating 18 U.S.C. §§ 371, 656, and 1341.[6]

Ford moved pursuant to Fed. R. Crim. P. 21 to transfer the case to the Western Division of the Western District of Tennessee. On October 1, 1987, Magistrate Robert P. Murrian entered an order granting the requested relief under Fed. R. Crim. P. 21(b), which permits transfers between districts "[f]or the convenience of parties and witnesses, and in the interest of justice . . . ."[7] The order specifically designated the Western Division of the Western District as the division to which the case was transferred.

Magistrate Murrian found that nine of the ten factors set forth in *Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240 (1964), favored a transfer to the Western Division, while the tenth factor was neutral. He ex-

---

[4] *See* Memorandum of Points and Authorities in Support of Motion of Defendant Ford for Discovery and Evidentiary Hearing To Determine If the Indictment Must Be Dismissed for Constitutional Violations Involving the Grand Jury at 7-10 (Aug. 7, 1987); Memorandum of Defendant Harold Ford in Support of Motion To Transfer the Proceeding to the Western Division of the Western District of Tennessee Pursuant to Rules 21(a) and 21(b) at 5-6 (July 28, 1987).

[5] Affidavit of Elliot A. Smyth, *supra* note 3, at ¶ 6 (describing census data).

[6] The gravamen of the indictment is the allegation that certain loans made between 1976 and 1983 constituted disguised income to Ford. The indictment alleges that the loans were made to support Ford's standard of living and to obtain his political support.

[7] Memorandum and Order of Transfer (Oct. 1, 1987).

pressly rejected the government's argument that Memphis was not a suitable venue because the government allegedly would have difficulty in obtaining a fair jury there in light of Ford's public comments concerning the case. He ruled that the government's concern about a fair jury may not be considered in deciding whether to transfer a case between districts under Rule 21, and he noted that the Sixth Circuit had made clear that Ford had the right to speak to his constituents.[8] The government appealed the transfer order to Judge James H. Jarvis, who ruled that the order was neither clearly erroneous nor contrary to law and dismissed the appeal. Order of Oct. 20, 1987.

Thwarted in its effort to keep the case in Knoxville, the government moved in Memphis pursuant to Rule 18 to "transfer this case to another city within this District for trial."[9] It urged the court to order that the place of trial "be either Jackson or Dyersburg and not Memphis."[10] Whereas 40% of the population in the Western Division (which includes Memphis) is black, only about 17 percent of the population of the Eastern Division, where Jackson is located,[11] is black.[12] The trial court was unable to recall any instance in which a federal trial had been held in Dyersburg.[13] Alternatively, the government

---

[8] In an effort to defend himself against what he deemed to be a racially and politically motivated prosecution, Ford became an outspoken critic of the government's case against him. On May 7, 1987, Judge James H. Jarvis of the Eastern District of Tennessee entered a broadly-worded "gag order" generally restricting Ford from publicly discussing the merits of the case. On September 25, 1987, the Court of Appeals vacated the order. *United States v. Ford*, 830 F.2d 596 (6th Cir. 1987).

[9] Motion To Transfer for Trial Within District at 1 (Jan. 5, 1988).

[10] Memorandum in Support of Motion To Transfer for Trial Within District at 10 (Jan. 5, 1988).

[11] 28 U.S.C. § 123(c)(1).

[12] Affidavit of Kelly A. Shanley ¶ 6 (July 16, 1989) (describing census data).

[13] Tr. of March 2, 1988 at 57.

urged that the jury be selected in another city but the trial held in Memphis. The government argued that the citizens of Memphis would not give the government a fair trial but instead would ignore the facts and law and decide the case based on passion and prejudice.[14]

On March 2, 1988, the District Court (Hon. Odell Horton) denied the government's motion to transfer. At that time, the court concluded:

> "[I]n judging the factors under Rule 18, the court is convinced those factors favor a trial in Memphis, Tennessee, *favor the selection of a jury in Memphis, Tennessee*, and the court so rules." [15]

The court noted, *inter alia*, that juries for trials in Memphis are drawn not only from Memphis but from several areas outside of Memphis.[16]

B. The First Trial.

Jury selection began on February 12, 1990. The government used all ten of its peremptory challenges against blacks.[17] The jury as selected consisted of eight blacks and four whites.[18]

The presentation of evidence began on March 1, 1990 and concluded on April 12, 1990. Late in the trial the government disclosed that one of the jurors, Reginald Tucker, had been arrested in 1982 on a bad check charge,

---

[14] Memorandum in Support of Motion To Transfer for Trial Within District at 3-6 (Jan. 5, 1988).

[15] Tr. of March 2, 1988 at 59 (emphasis added).

[16] *Id.* at 54.

[17] *See* Response of the United States to Petition for Writ of Mandamus by Harold E. Ford at 6 (June 14, 1991). The defense used all 20 of its peremptory challenges against whites. Neither the defense nor the prosecution asserted a *Batson* claim during the first trial.

[18] *See* Response of the United States to Petition for Writ of Mandamus at 5-6 (June 14, 1991).

although he had answered "no" to question 28 on the juror questionnaire, which asked whether he had previously been arrested or involved with the police. Mr. Tucker explained that the arrest resulted from a mix-up and that the charges were dropped. Tr. of April 18-19, 1990 at 38. Mr. Tucker testified that he had answered the questionnaire "as honestly as I could," and had interpreted the question to refer to actual convictions, not mere arrests. *Id.* at 38-39. Tucker was excused and was replaced by an alternate.

The jury retired to deliberate on April 24, 1990. On April 25, 1990 the jury foreman announced that the jury was deadlocked eight to four for acquittal. The court instructed the jurors to continue their deliberations. On April 27, 1990, the jury again reported itself deadlocked. The government also disclosed that another juror, Juanita Ruffin, had failed to disclose two convictions in the 1970's on the juror questionnaire she had completed during voir dire. Ms. Ruffin stated that, based on what her husband had told her, she honestly but, as it turned out, mistakenly understood that the questionnaire did not encompass matters that were more than 10 years old. Tr. of April 27, 1990 at 96-97, 105-106, 115-116.[19] She was excused. That same day, over the defendants' objections, the District Court declared a mistrial on the ground that the jury could not reach a verdict.

C. The Government's Efforts To Ensure That the Retrial Would Not Be in Memphis.

Two months after the mistrial, the government filed a motion styled "Motion for Protection of Integrity of the Jury Process." As the District Court noted, the motion was clearly a request "to order retrial of this case in

---

[19] Long before Ms. Ruffin could have had the slightest inkling that she might be called to sit as a juror in this case, she had also omitted the information about her convictions from the juror qualification questionnaire that the Clerk's Office had required her to complete.

another location within this district, presumably Jackson, Tennessee." [20]

In support of the motion, the government relied upon the affidavit of FBI Special Agent Wayne P. Tichenor. After the first trial, Mr. Tichenor had conducted an investigation into alleged juror misconduct and had interviewed each of the jurors. Mr. Tichenor asserted, *inter alia*, that Juror Ruffin "said that even though she felt Mr. Ford was guilty on some counts, she had voted not guilty during deliberations. She felt sorry for him[]"; that Jurors Tucker and Robinson declined to indicate to Tichenor whether they thought the charges against Ford reflected a vendetta; that, according to unnamed persons "in a position to know," Juror Hyman had said she could not vote guilty because of what Ford had done for Memphis and had said she did not care what the evidence showed; and that unnamed persons had attempted to influence the jury. All of the jurors whose conduct was questioned in the Tichenor affidavit were black. At the hearing on the government's motion, the District Court, over the defense's objection, admitted the affidavit. Tr. of Sept. 27, 1990 at 62-63.

At the hearing, government counsel argued that, because of the high regard in which Congressman Ford is held by the black community in Memphis, the government could not receive a fair trial if the jury was again selected in the Western Division:

> It may be asking too much of a person to live in this community the way this community is at this time, the way it has been historically, and ask that person to sit in judgment of someone who is as popular, *particularly in the black community*, as Harold Ford.
>
> . . . .

---

[20] A. 33a.

> And I submit to the court that we don't have to guess any more about what took place there. We know what took place, and we know why it took place. And it is not unlike a human being to have the kind of loyalty that people show to Congressman Ford, but *we cannot get a fair trial if those are the kind of people we are going to have on the jury.*

Id. at 65, 74-75 (emphasis added).[21]

Counsel for Ford took issue with the government's argument:

> Because a person is popular and because a person is a public figure, because a person has his actions and words taken down in the media does not carry with it the corollary that that person forfeits his right to be tried in the place of his home and the place of his work and the place where the case properly belongs.

Id. at 81.

The court made clear that it agreed with the government:

> That's really not at the core of what we are faced with here, Mr. McDaniels, as I see it. We have had trials involving very popular people. There was a trial here involving a Memphis State basketball coach, a very, very popular person. It is a lengthy trial, but we didn't have the kind of problems with the jury that we had in this case.
>
> And it seems to me that the fundamental problem we have in this case is whether it is possible for a fair trial to be conducted in Memphis in this case. And this is fairness to both sides. And stripped to its bare bones, *what we are talking about is whether a very popular black congressman and whether the government and these other things can receive a fair trial from a jury selected in Memphis where a large part of the population is a minority.*

---

[21] *See also* Tr. of Sept. 27, 1990 at 73, 74.

> And a—and *a question of whether minority jury members are willing to be open minded and fair and consider the evidence in the case, the law that applies to that evidence and follow the court's instructions.* Now to me, I'm saying me, not you, not the defense, not Mr. Clancy, to me this is a fundamental kind of inquiry given the experience that we have had with this jury.
>
> In this case the court agrees that we would conduct [an] extensive voir dire, that we would do it all here in the courtroom, and that we would do it on an individual basis. And that the attorneys would be given the maximum leeway to participate in that voir dire. And that was done over a period of approximately two weeks.
>
> The end result of this process was that we got jurors who faithfully promised to listen to the evidence, to follow the law, to abide by the court's instructions. The reality is some jurors did not do that, flagrantly disregarded the court's instructions and made a mockery of justice in this courtroom.
>
> Now it seems to me that talking about whether a popular person can get a fair trial or not does not get down to the issue that this court must face, and that is a question, is it possible—*is it possible in Memphis Tennessee, given it's demographic makeup, for a fair jury to be selected and impaneled to try this case.* That to me is where we've got to get down to and where this court has to make a decision. Now if I am wrong, you tell me.

A. 40a-41a (emphasis added).

When defense counsel objected to making a generalization about the fairness of black prospective jurors, the court interrupted, not to deny that it was referring to blacks as a group, but to clarify that it was speaking of their willingness to serve as fair jurors:

> MR. McDANIELS: I reject the notion, I'm not suggesting that you have stated that isn't where you

> have come out on this question, but I reject unequivocally the notion that in 1990, 1989 or whatever year we are in this case that black citizens in Memphis are incapable of judging fairly—
>
> THE COURT: I didn't say they were incapable, I'm not speaking about their being incapable. *I'm speaking in terms of whether there is a willingness, whether it just simply can be done.*
>
> Mr. Robinson is a very intelligent and capable man. That had nothing to do with what he ultimately did.[22]

A. 41a (emphasis added).

The District Court did in fact take steps to ensure that none of the black residents of Memphis would serve as a juror at the retrial. In a Memorandum and Order dated April 10, 1991, the court ruled pursuant to Rule 18 that jury selection for the retrial—but no other part of the trial—would be held in Jackson, in the Eastern Division of the Western District. A. 35a. The jurors are to be selected in Jackson but thereafter they will be transported to Memphis, where the remainder of the trial will be held. As noted, whereas 40% of the population of the Western Division (where Memphis is located) is black, only 17% of the population of the Eastern Division is black.

In its ruling, the District Court again found that the three factors enumerated in Rule 18 require that the trial, with the sole exception of jury selection, be held in Memphis: "the retrial of this case will be conducted in Memphis, Tennessee for the convenience of the defendants, witnesses and the prompt administration of justice." *Id.* The court emphasized, however, that its "greatest concern [was] that a properly selected unbiased and nonprejudiced jury will listen to the evidence in this case, listen to the law that applies to the case, deliberate with

---

[22] Mr. Robinson was the foreman of the first jury and was criticized by the court because he announced the jury had a verdict, when the jury in fact had reached an eight-to-four deadlock.

fellow jurors, and reach a fair and just decision based upon the evidence and the law, nothing more, nothing less." A. 36a.

The court cited five factors which it said were "[a]mong" those supporting its decision to transfer jury selection to Jackson. First, the intensive publicity during the first trial was "primarily targeted to people living in Memphis." A. 35a. Second, whereas there were "strong indications of juror contact with outside persons or sources during the initial trial," such contact "should be substantially minimized" by the transfer, because "Eastern Division jurors will probably be, for the most part, generally unknown in Memphis, Tennessee." *Id.* Third, asserting that some spectators at the first trial often expressed their displeasure with the court's rulings "vocally and/or with their feet," the court indicated that such conduct "should be of substantially less effect on jurors chosen from the Eastern Division of this district." A. 36a. Fourth, "[t]wo known jurors gave false and/or incomplete answers to questions asked of them during voir dire touching on their qualifications to serve as jurors." *Id.* Finally, "[a]fter trial interviews with two jurors by the FBI showed that possibly two jurors were unwilling to follow the law of the case," but "[t]his type of conduct should not be a factor if jurors are selected from the Eastern Division of the district." *Id.*

D. The Court of Appeals's Decision.

Petitioner sought a writ of mandamus from the Court of Appeals setting aside the transfer. Petitioner argued, *inter alia*, that the transfer was based on factors that cannot be the basis for fixing the place of trial under Rule 18; that the Jury Selection and Service Act, 28 U.S.C. § 1861 *et seq.*, does not permit a court to select the jury in one division and hold the rest of the trial someplace else; that the transfer was unconstitutional under *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Taylor v. Louisiana*, 419 U.S. 522 (1975); and that the Dis-

trict Court acted contrary to law in admitting and relying upon Special Agent Tichenor's affidavit.

The Court of Appeals denied the petition. It concluded that "the district court has the authority to order an intradistrict transfer in cases like the present one," and that "[w]hether the district court properly ordered a transfer in this case is a matter addressed to the district court's discretion." A. 12a-13a. The court also emphasized that petitioner had failed to demonstrate an absence of adequate alternative means of relief, because he could ultimately challenge the transfer order on appeal from any conviction that might result at the new trial. A. 13a. On April 24, 1992, the Court of Appeals denied a timely petition for rehearing with suggestion for rehearing *en banc*. A. 38a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS'S DECISION IS CONTRARY TO THE EXPRESS COMMAND OF RULE 18 THAT THE PLACE OF TRIAL WITHIN THE DISTRICT SHALL BE FIXED "WITH DUE REGARD TO THE CONVENIENCE OF THE DEFENDANT AND THE WITNESSES AND THE PROMPT ADMINISTRATION OF JUSTICE".

Citing the three factors enumerated in Rule 18, the District Court expressly ruled that "retrial of this case will be conducted in Memphis, Tennessee, for the convenience of the defendants, witnesses and the prompt administration of justice." A. 35a. Nevertheless, the court ordered a transfer to the Eastern Division for purposes of jury selection. A. 35a-36a. The Court of Appeals ruled that the district court had "the authority to order an intradistrict transfer in cases like the present one," and that whether it properly ordered a transfer in this case was "a matter addressed to the district court's discretion." A. 12a-13a. In so ruling, the Court of Appeals adopted a position contrary to the decisions of several

other circuits, the language of Rule 18, and the advisory committee note to the 1979 amendment to the Rule, all of which make clear that the criteria enumerated in the rule are controlling. The Court of Appeals's decision is also inconsistent with *Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240 (1964), and other decisions establishing that the government's purported interest in a fair trial is not a basis for moving the place of a criminal trial.

As originally written, Rule 18 required that trial occur in the district and division in which the offense was committed.[23] 5 F.R.D. 573, 591 (1946). In 1966 the requirement of trial in the division in which the offense was committed was abolished, and the following sentence was added to the Rule: "The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses." 383 U.S. 1089, 1101 (1966).[24]

It did not take long for the courts to conclude that the factors identified in this sentence of the amended Rule were intended to be controlling. In *Dupoint v. United States*, 388 F.2d 39 (5th Cir. 1967), the Fifth Circuit declared:

> The Federal Rules of Criminal Procedure have the force and effect of law. Just as a statute, the re-

[23] The Constitution does not require that a defendant be tried in the division where the offense was committed. *United States v. Anderson*, 328 U.S. 699, 704-05 (1946).

[24] The 1966 advisory committee note makes clear that "the convenience of the defendant" was intended to encompass not only a defendant's interest in being tried near his residence but also his interest in a fair trial. *See also, e.g., United States v. Mabry*, 809 F.2d 671, 683 (10th Cir. 1987); *United States v. James*, 528 F.2d 999, 1021-22 (5th Cir. 1976); *cf. Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1976) ("[t]o safeguard the due process rights of the accused, a trial judge has an affirmative duty to minimize the effect of prejudicial pretrial publicity"); *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

> quirements promulgated in these Rules must be obeyed. . . . The real effect of Rule 18 is that [a transfer] is not to be done except with due regard for the defendant's convenience *and* that of the witnesses. The convenience of the government is not a factor.

Id. at 44 (emphasis in original). Similarly, in *United States v. Fernandez*, 480 F.2d 726, 730 (2d Cir. 1973) (Friendly, J.), the Second Circuit made clear that the convenience of the trial judge was not a proper basis for fixing the place of trial under Rule 18.

In 1979, Rule 18 was amended to add a third factor, "the prompt administration of justice," and thereby facilitate compliance with the Speedy Trial Act of 1974. The advisory committee note demonstrates that the amendment was considered necessary precisely because the factors listed in the Rule had been held to be controlling, and the note also expressly states that the addition of a third factor does not mean that the place of trial may be fixed based on still other factors:

> This amendment is intended to eliminate an inconsistency between Rule 18, which in its present form has been interpreted not to allow trial in a division other than that in which the offense was committed except as dictated by the convenience of the defendant and witnesses, *Dupoint v. United States*, 388 F.2d 39 (5th Cir. 1968), and the Speedy Trial Act of 1974. . . .
>
> . . . .
>
> The amendment to rule 18 does not eliminate either of the existing considerations which bear upon fixing the place of trial within a district, but simply adds yet another consideration in the interest of ensuring compliance with the requirements of the Speedy Trial Act of 1974. *The amendment does not authorize the fixing of the place of trial for yet other reasons.* Cf. *United States v. Fernandez*, 480 F.2d 726 (2d Cir. 1973) (court in the exercise of its super-

> visory power held improper the fixing of the place of trial "for no apparent reason other than the convenience of the judge").

(Emphasis added).

In keeping with the language of the Rule and the advisory committee note to the 1979 amendment, most courts have continued to treat the factors listed in the rule as controlling. *In re Chesson*, 897 F.2d 156, 159 (5th Cir. 1990) ("In deciding the place of trial within the district, the court must balance the statutory factors of the convenience of the defendant and witnesses with the prompt adminstration of justice."); *United States v. Dickie*, 775 F.2d 607, 610 (5th Cir. 1985) (same); *United States v. Burns*, 662 F.2d 1378, 1382 (11th Cir. 1981) ("*Dupoint* and *Fernandez* demonstrate that the court is not authorized to fix the place of trial on the basis of other considerations to the exclusion of [those listed in the Rule]."). The Court of Appeals's decision here is in conflict with these decisions, as well as with *Dupoint* and *Fernandez*.

The decision below is also in conflict with a decision of this Court and the decisions of other courts of appeals insofar as it permits a transfer based on the government's purported interest in a fair trial.

Platt v. Minnesota Mining & Manufacturing Co., 376 U.S. 240 (1964), made clear that consideration of whether the jury will be fair to the government is not a proper consideration in ruling on a motion under Rule 21(b) to transfer a case between districts. There, the trial court denied a defense motion for a transfer from Illinois to Minnesota, in part because it "would be more difficult [for the government] to get a fair and impartial jury" in Minnesota. *Id.* at 241. The court of appeals held that consideration of that factor was impermissible, reconsidered the issue of transfer anew, and directed the trial court to transfer the case. Although this Court concluded that the court of appeals had overstepped its authority in

assessing for itself the various factors relevant to the motion, the Court clearly embraced the court of appeals's ruling that the trial court had erred in considering the government's interest in a fair trial. Indeed, the government did not even challenge that ruling. *Id.* at 244. In a unanimous decision, this Court directed the court of appeals to remand the case to the district court for reconsideration of the motion "without reference to the ability of the United States to receive a fair and impartial trial." *Id.* at 246. In a concurring opinion, Justice Harlan emphasized that "the Court of Appeals was entirely correct in holding that the District Court's speculation that the government might not be able to obtain an impartial jury in the Minnesota District was wholly out of bounds." *Id.*

The same position has been adopted in subsequent decisions under both Rule 21(b), *see Jones v. Gasch*, 404 F.2d 1231, 1242 n.54 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968), and Rule 18, *see Dickie*, 775 F.2d at 610; *cf. Dupoint*, 388 F.2d at 448 ("[t]he convenience to government is not a factor" to consider under Rule 18).

The decisions below are also contrary to *United States v. Cates*, 485 F.2d 26 (1st Cir. 1974), which interpreted § 101 of the Jury Selection and Service Act of 1968 ("JSSA"), Pub. L. 90-274, 82 Stat. 54, *codified at* 28 U.S.C. § 1861. That provision declares "the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community *in the district or division wherein the court convenes.*" (Emphasis added). *See also* 28 U.S.C. §1863(a) (requiring adoption of plans to achieve the objectives of §1861); 28 U.S.C. § 1866(c) (barring exclusion from jury service except as authorized). *Cates* held as follows:

> [W]hen the court convenes to impanel a grand jury, the grand jurors shall be drawn from the district or surrounding division, and . . . when later the trial

> court convenes—perhaps in a different division—the petit jurors must come either from the district or from the division wherein the court is then convened.

485 F.2d at 27. Since here the District Court intends to convene the actual trial in the Western Division, it would violate the JSSA to draw the petit jurors from the Eastern Division.[25]

In view of the importance and recurring nature of the issue, *cf. Fernandez*, 480 F.2d at 730 (providing guidance regarding Rule 18 because of potential "problems in future cases unless corrective measures are taken"), certiorari should be granted to resolve these conflicts.

II. THE COURT OF APPEALS'S DECISION IS CONTRARY TO THE PRINCIPLE ESTABLISHED IN *BATSON v. KENTUCKY*.

This case also presents an important issue concerning the reach of the principle established in *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Batson*, this Court held that, although the reasons for exercising peremptory challenges are ordinarily committed to the unfettered discretion of counsel, a prosecutor may not use a peremptory challenge to strike prospective jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89.

---

[25] The District Court erred in citing as authority for its action Standard 8-3.5 of the *ABA Standards for Criminal Justice*, A. 34a. The standard is limited by its terms to jurisdictions where drawing jurors from other locations is permissible. *ABA Standards for Criminal Justice*, Standard 8-3.5 (3d ed. 1992). As *Cates* and the language of the JSSA show, drawing jurors from another division is not permissible in federal court. *But cf. United States v. Balistrieri*, 778 F.2d 1226, 1228-29 (7th Cir. 1985) (approving under Rule 18 a transfer to another division for purposes of jury selection only, without consideration of the JSSA, in a case in which one defendant had appealed his conviction at the first trial based on adverse publicity), *cert. denied*, 477 U.S. 908 (1986).

The Court further held that, where a *prima facie* showing has been made that a prosecutor has exercised peremptory challenges based on race, the burden shifts to the State to present "a neutral explanation" for the challenges. *Id.* at 97.

In the six years since *Batson* was decided, the Court has on numerous occasions granted certiorari to resolve issues concerning the scope and application of the principle established in that case.[26] The present case presents a significant question concerning the scope of the *Batson* principle that this Court has not yet addressed: May a trial court, at the request of the prosecution, transfer a case (either for all purposes or for jury selection) because the court believes that black residents of the transferor division will not serve as fair and impartial jurors?

Such a belief was unquestionably the primary, if not the sole, basis for the transfer order in this case. Both government counsel and the District Court made comments at the hearing on the government's motion that focused explicitly on the black citizens of Memphis. *See* pages 8-11, *supra*. Moreover, at least two of the

---

[26] *See Ford v. Georgia*, 111 S. Ct. 850 (1991) (petitioner properly raised *Batson* claim in the trial court); *Trevino v. Texas*, 112 S. Ct. 1547 (1992) (petitioner properly preserved his equal protection claim before Texas Court of Criminal Appeals); *Hernandez v. New York*, 111 S. Ct. 1859 (1991) (no *Batson* violation where prosecutor struck jurors on the ground that they spoke Spanish and based on their answers in voir dire it was uncertain whether they would respect the interpreter as the final arbiter of what each witness said); *Powers v. Ohio*, 111 S. Ct. 1364, 1366 (1991) (defendant may object to race-based exclusions of jurors through peremptory challenges even if the defendant and the excluded jurors are of different races); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2080 (1991) (race-based peremptory challenges in civil litigation violate the equal protection rights of excluded jurors); *Holland v. Illinois*, 493 U.S. 474 (1990) (*Batson* principle is not part of Sixth Amendment right to a jury drawn from a fair cross section of the community); *Georgia v. McCollum*, 60 U.S.L.W. 4574 (U.S. June 18, 1992).

factors that the District Court cited in its Memorandum make sense only if understood in the context of the court's comments at the hearing. In its Memorandum the court cited as one factor the fact that, at the first trial, "[t]wo jurors gave false and/or incomplete answers to questions asked of them during voir dire touching on their qualifications to serve as jurors." A. 36a. This factor could be relevant only if it is assumed that the conduct of these two jurors is proof of the attitude of the black citizens of Memphis in general. The same is true of the fifth factor cited by the court, the post-trial interviews which "showed that possibly two jurors were unwilling to follow the law of the case." *Id.*[27]

The Sixth Circuit held that "[w]hether the district court properly ordered a transfer in this case is a matter addressed to the district court's discretion." A. 13a. But if the District Court was bound by the principle established in *Batson*, then the matter was not one addressed to its discretion, for if *Batson* applies the court had no discretion to predicate its transfer order on a generalization about the willingness of the black residents of Memphis to serve as fair jurors.

This Court has recognized that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*,

---

[27] An exclusion from the jury violates the Constitution if it is based even in part on race. It is also significant, however, that the other three factors cited by the court do not support a transfer from Memphis to Jackson. The publicity surrounding the case is equally present in Jackson, since Jackson and Memphis share the same print and TV media. Exposure to prejudicial publicity will have to be explored on voir dire whether the jurors are chosen in Memphis or in Jackson. The second and third factors, the indications of outside contacts with jurors and the behavior of spectators at the trial, A. 35a-36a, also do not support a transfer for purposes of jury selection; to the extent that these are concerns, the logical means of dealing with them are sequestration and courtroom control.

443 U.S. 545, 555 (1979); *see Powers v. Ohio*, 111 S. Ct. 1364, 1366 (1991). The Court has considered the constitutional prohibition of racial discrimination so far-reaching as to require a limitation of even the peremptory challenge, which for centuries had permitted jurors to be struck, without explanation, for any reason at all and, in the case of defense counsel, had been considered "one of the most important of the rights secured to the accused," *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965). The Court has concluded that the use of a peremptory challenge to strike even a single juror on account of race violates the Constitution.

This case involves a far more drastic form of exclusion from jury service. What occurred here was not merely the striking of one or more individual jurors, but rather the transfer of a case, for purposes of jury selection, in order to exclude from the jury *all* black citizens who reside in the transferor division. Such transfers have been condemned by a state court in a case decided even before *Batson*, *Garland v. State*, 367 A.2d 30, 33-35 (Md. App. 1976), and by two Justices of this Court, *see Mallett v. Missouri*, 494 U.S. 1009 (1990) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari) ("Just as state prosecutors may not use peremptory challenges to exclude members of the defendant's race from the jury [citing *Batson*], state trial courts may not transfer venue of the trial to accomplish the same result by another means.").[28] The District Court's decision in this case, and the Court of Appeals's ruling that the matter was addressed to the District Court's discretion, are contrary not only to *Batson* but also to a long line of decisions dating back to *Strauder v. West Virginia*, 100 U.S. 303 (1880), which held that a State denies a black defendant the equal protection of the laws when it forces

---

[28] *See also Person v. Miller*, 854 F.2d 656, 665 (4th Cir. 1988) (rejecting notion that no black could serve as a fair and impartial juror in the trial of a white supremacist).

him to stand trial before a jury from which blacks have been deliberately excluded.[29]

The District Court's concerns about alleged juror misconduct and alleged improper contacts with jurors do not justify the court's action in transferring this case for juror selection based on a generalization about the black citizens of Memphis. Even if the record could support a finding that certain black jurors at the first trial engaged in deliberate misconduct demonstrating bias in favor of Ford,[30] it is impermissible to leap from such a finding to a conclusion about the black citizens of Memphis in general and to move the place of jury selection based on such a generalization. The Constitution simply does not allow jurors to be excluded based on a race-based generalization.

That is true whether or not in a particular case there might be some basis for believing that jurors of one race will be more sympathetic to one side or the other, or even that jurors of one race are more likely to be subject to a challenge for cause after voir dire:

---

[29] *See also Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (the Sixth Amendment guarantee of a jury drawn from a representative cross section of the community prohibits exclusion of identifiable segments of the community).

[30] In fact, the record does not support that conclusion. As this Court has said, "jurors are not necessarily experts in English usage," *McDonough Power Equipment Co. v. Greenwood*, 464 U.S. 548, 555 (1984), and it cannot lightly be concluded that a nondisclosure during *voir dire* was deliberate. Even if the nondisclosures were deliberate, there is no proof that they reflected bias in favor of Ford. *See* note 19, *supra*. Similarly, the fact that Juror Ruffin allegedly felt Ford was guilty on some counts but voted not guilty does not show misconduct on her part; the constitutional standard is proof beyond a reasonable doubt, not a "feeling" that the defendant is guilty. It also bears emphasis that the District Court's ruling was predicated to a large extent on double hearsay statements in Special Agent Tichenor's affidavit.

> We ought not delude ourselves that the deep faith that race should never be relevant has completely triumphed over the painful social reality that, sometimes, it may be. That the Court will not tolerate prosecutors' racially discriminatory use of the peremptory challenge, in effect, is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact.

Brown v. North Carolina, 479 U.S. 940, 941-42 (1986) (O'Connor, J., concurring in the denial of certiorari).

"This Court firmly has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror." *Georgia v. McCollum*, 60 U.S.L.W. 4574, 4579 (U.S. June 18, 1992) . *McCollum* confirms that the prohibition against exclusion predicated on a race-based generalization is not limited to cases in which such a generalization is wholly irrational. The defendants in *McCollum* were white; the alleged victims of the crime were black; shortly after the events, a leaflet had been widely distributed in the local black community reporting the incident and urging residents not to patronize the defendants' business; and the prosecution stated that it expected to show that the victims' race was a factor in the crime. *Id.* at 4575. Nonetheless, the Court held that individuals could not be struck from the jury in reliance on a race-based generalization, and made clear that voir dire was the proper means of identifying persons who could not serve as impartial jurors. *Id.* at 4579. That ruling is controlling here.

The transfer is particularly unwarranted because less drastic measures are available, including sequestration, intensive voir dire, and strict control of any inappropriate courtroom behavior. The District Court has in effect ruled that, no matter what testimony the black citizens of Memphis give under oath on voir dire and no matter how credible the court may find them, they cannot be trusted

to sit as fair and impartial jurors in this case. Such a sweeping conclusion is not defensible.[31]

The Court should grant certiorari not only because this case presents an important issue concerning the reach of *Batson*, but also in the exercise of the Court's supervisory power. *See Ballard v. United States*, 329 U.S. 187, 193 (1946); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 225 (1946). This case involves a prosecution brought in federal court. To our knowledge, this is the first time in the history of the federal courts that the place of trial or jury selection has been transferred on the ground that citizens of a particular race in the transferor division allegedly cannot serve as fair and impartial jurors. Such an extraordinary step warrants the attention of this Court. Certiorari should be granted and the case should be fully briefed and argued, or the Court should grant certiorari, vacate the decision below, and remand for further consideration in light of *McCollum*.

III. FEDERAL RULE OF EVIDENCE 606(b) PROTECTS THE DELIBERATIVE PROCESS OF THE JURY WHETHER OR NOT THE JURY ULTIMATELY REACHES A VERDICT.

This case presents the additional question of whether Federal Rule of Evidence 606(b) applies when a jury is unable to reach a verdict and a mistrial is declared. Rule 606(b) provides in pertinent part:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith . . . .

---

[31] *Cf. United States v. Salamone*, 800 F.2d 1216, 1224-27 (3d Cir. 1986) (trial court erred in excluding from the jury all persons affiliated with National Rifle Association in criminal prosecution for firearms offenses).

In admitting Special Agent Tichenor's affidavit and relying on portions of that affidavit that recite alleged statements by jurors about their mental processes and about comments made by other jurors during deliberations, A. 36a, the District Court necessarily concluded that Rule 606(b) does not apply when the jury fails to reach a verdict. That was also the position taken by the government.[32] Two other federal courts have reached the opposite conclusion. *United States v. MacQueen*, 596 F.2d 76, 83 (2d Cir. 1979); *McKay v. Raines*, 405 F. Supp. 363, 365 (D. Kan. 1975); *accord New Mexico v. Castrillo*, 566 P.2d 1146, 1148 (N.M. 1977) (interpreting State rule modeled on Rule 606(b)).

Certiorari should be granted to resolve this conflict. As this Court has declared, "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." *Tanner v. United States*, 483 U.S. 107, 127 (1987). Whether these concerns are to be discarded whenever a jury fails to reach a verdict is an important issue. If Rule 606(b) has no application in that situation, then the door is open to a great deal of mischief, including efforts, as in *MacQueen* and *Raines*, to show that a jury in fact acquitted the defendant on certain charges before a mistrial was declared.

IV. THE COURT OF APPEALS'S RULING THAT A TRANSFER ORDER CANNOT BE CHALLENGED THROUGH A PETITION FOR MANDAMUS IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

The Court of Appeals's ruling that a transfer order is not reviewable on mandamus, because it can be attacked on appeal after trial, A. 13a, also merits review. That ruling is also in conflict with the decision of several courts of appeals.

---

[32] Tr. of September 27, 1990 at 127; Response of the United States to Petition for Writ of Mandamus by Harold E. Ford at 32 (June 14, 1991).

Every transfer within the federal court system can ultimately be challenged on appeal following trial and the entry of final judgment. In numerous decisions, however, the federal courts have rejected any notion that a party facing a trial in the wrong place is foreclosed from obtaining relief through mandamus simply because he could one day raise the issue on appeal and, if successful, go through another trial in the right place. *See Jones v. Gasch*, 404 F.2d 1231, 1242 (D.C. Cir. 1967) (transfer under rule 21(b)), *cert. denied*, 390 U.S. 1029 (1968); *Minnesota Mining & Manufacturing Co. v. Platt*, 314 F.2d 369, 375 (7th Cir. 1963) (same), *vacated on other grounds without consideration of whether review on mandamus was appropriate*, 376 U.S. 240 (1964); *Sunshine Beauty Supplies, Inc. v. U.S. Dist. Court for Central Dist. of California*, 872 F.2d 310, 311 (9th Cir. 1989) (transfer under 28 U.S.C. § 1404(a)); *Hustler Magazine Inc. v. U.S. Dist. Court for Dist. of Wyoming*, 790 F.2d 69, 71 (10th Cir. 1986) (same); *In re Scott*, 709 F.2d 717, 719 (D.C. Cir. 1983) (same); *In re McDonnell-Douglas Corp.*, 647 F.2d 515, 517 (5th Cir. 1981) (same).

In holding that transfer orders are reviewable on mandamus, the courts have recognized that such orders, like the denial of a jury trial [33] or the assignment of a case to a master,[34] so fundamentally affect the conduct of a trial as to make it essential that a party be permitted to obtain immediate relief if he can establish that the district court acted contrary to law.[35] The Sixth Circuit's

---

[33] *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959) (right to writ of mandamus is "settled" where jury trial improperly denied); *In re Union Nacional de Trabajadores*, 502 F.2d 113, 116 (1st Cir. 1974) (mandamus appropriate to preserve jury trial in criminal case), *vacated on rehearing on other grounds*, 527 F.2d 602 (1st Cir. 1975).

[34] *See La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (court of appeals properly issued writ of mandamus to protect litigant's right to a trial before the court rather than special master).

[35] *Cf. Will v. United States*, 389 U.S. 90, 98 (1967) (leaving open the question of when mandamus is appropriate to review an inter-

decision here, which forecloses relief merely because Ford could challenge the transfer on appeal if he is convicted, is in conflict with these decisions. For this reason as well, certiorari should be granted.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

WILLIAM E. MCDANIELS *
PAUL MOGIN
THOMAS M. PATTON
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000
Counsel for Petitioner
Harold E. Ford

*Counsel of Record

---

locutory procedural order in a criminal case); *id.* at 108 (Black, J., concurring) (concurring in reversal of writ of mandamus, but emphasizing that the court of appeals possessed the power to issue the writ if justified by the circumstances).

APPENDIX

APPENDIX

TABLE OF CONTENTS

	Page
Opinion of the Court of Appeals	1a
Memorandum and Order of the District Court	15a
Order of Court of Appeals Denying Rehearing and Rehearing *En Banc*	38a
Transcript of Proceedings Before the District Court **(September 27, 1990)**	40a

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 91-5497/5548

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.

HAROLD E. FORD, DOUGLAS BEATY,
KARL A. SCHLEDWITZ, and DAVID CRABTREE,
Defendants-Appellants,

and

IN RE: HAROLD E. FORD,
Petitioner.

On Appeal from the United States District Court
for the Western District of Tennessee

[Filed Mar. 2, 1992]

Before: MARTIN and Milburn, Circuit Judges; and CONTIE, Senior Circuit Judge.

PER CURIAM. Defendants appeal an order denying their motion to dismiss criminal charges on grounds of double jeopardy, arguing that the district court erred in granting a mistrial. Defendant Harold Ford also seeks mandamus review of an order directing jury selection for his retrial take place in a city other than the site of his retrial, and the propriety of the district court's con-

sideration of an FBI affidavit outlining evidence of juror misconduct.

I.

Four defendants, Douglas Beaty, Karl S. Schledwitz, David Crabtree and Congressman Harold E. Ford, were charged in a nineteen count indictment with conspiracy, bank fraud and mail fraud. The allegations of the indictment allege, among other things, that the defendants conspired to defraud the trustee in bankruptcy for the Southern Industrial Banking Corporation ("SIBC"). The indictment also alleges that an ongoing pattern of "loans" were made from SIBC to Ford, with no expectation of repayment.

This case was investigated by a grand jury sitting in Memphis, the Western District of Tennessee. However, the case was actually presented to the grand jury in Knoxville, in the Eastern District of Tennessee. The government maintained that Knoxville was the only site where venue existed for all charges. However, three of the four defendants were from Memphis, and so, defendants argued that venue properly rested there. Upon indictment by the Knoxville grand jury, Ford began to speak out against the government's handling of the case. Ford alleged that the indictment was sought in Knoxville rather than in Memphis to deprive him of a fair trial. The district court entered a gag order limiting Ford's comments, which was subsequently reversed on appeal by this court. *United States v. Ford*, 830 F.2d 596 (6th Cir. 1987).

Subsequently, in response to defense motions, the United States Magistrate in Knoxville recommended that under Fed. R. Crim. P. 21(b), the defendants were entitled to transfer the case from the Eastern District to the Western District of Tennessee. The United States appealed the transfer order, but the district court affirmed. Accordingly, the case was transferred to Memphis.

The United States then filed a motion in the Memphis district court to have the case transferred outside of the Memphis area, which was, the government contended, subject to pretrial publicity to such a degree that a fair trial would be impossible. The district court judge denied the motion, concluding that the jury pool would include jurors from counties outside of Memphis, which was the primary target of the pre-trial publicity. The district court specifically ruled out Jackson, Tennessee, in the Eastern Division of the Western District, because a highly publicized trial had recently occurred there. The court expressed its confidence that a fair jury trial could be conducted in Memphis, despite the fact that Congressman Ford had generated much publicity there and was a popular local figure.

The venue of the case having been settled, the case proceeded. Trial finally commenced on February 12, 1990. The United States presented evidence from March 1, 1990 through March 15, 1990 and from March 19, 1990 through April 12, 1990. The defendants put on no testimony.

When the case was ready for closing arguments one of the jurors failed to appear. When he later appeared he explained that he had been arrested the prior night on a traffic charge. Further questioning revealed that he had at least one prior arrest even though he had stated on the jury questionnaire that he had never been arrested. This juror was excused, and an alternate juror was appointed.

Closing arguments were then made, and the case was submitted to the jury on Tuesday, April 24, 1990. On the second day of deliberations, Wednesday, April 25, 1990, the jury requested the trial transcript, but since no transcript was available, the jury was informed that it would take 30 days to prepare. Later this second day, the jury announced that it was ready to return a verdict. The court instructed the foreman to read the verdict to the

court. The foreman read: "[Counts] One, Five, Six, Seven and Eight, we have four guilty and eight not guilty." Joint Appendix at 318. In addition, the foreman stated "at this particular time the jury is in a hopeless deadlock as far as coming back with a verdict." *Id.*

In response, the court stated "I don't know what else you can do but they just have to go back and start over again, and I'm not going to let them come back after a short time and tell us that they are hopelessly deadlock[ed]." *Id.* at 319. The court then ordered the jury to resume deliberations on the following day.

On Thursday, April 26, the jury requested the trial testimony of seven witnesses, rather than the testimony of all the witnesses as was requested earlier. The court informed the jury that this could take two weeks to prepare, but that some transcripts could be prepared sooner.

On the next morning, Friday, April 27, the government moved to bring to the attention of the court prior undisclosed convictions of one of the jurors. The jury was adjourned early, but prior to leaving provided a note to the court which stated:

> The majority of the jury has voted by secret ballot (9-3) that it cannot reach a guilty or not guilty verdict without violence to individual judgment.

A hearing was then held, and the juror admitted that she had been convicted of two prior felonies, but did not admit to them on the jury questionnaire. She was dismissed.

The court then returned to the question of the jury's deadlock. The court asked the foreman to explain, and he replied that the jury was hopelessly deadlocked, and there was no chance of reaching a verdict without violence to individual judgment. The judge polled the jury, and all jurors agreed that a hopeless deadlock had been reached.

The defense requested that the jury be sent back for further deliberations, that the court read the jury a modified "*Allen* charge", and that the jury be instructed that it could return a partial verdict or verdicts as to one or several defendants. After considering each alternative, the court held that the jury deadlock made it manifestly necessary for it to declare a mistrial. Secondarily, the district court justified its decision to declare a mistrial based on prior juror misconduct, allegations of improper juror contact, and attempts to influence the jury.

Following the declaration of a mistrial an FBI investigation was conducted which included interviews of all jurors and other witnesses. The affidavit of the special agent conducting this investigation indicated that in addition to the problems associated with the two dismissed jurors, another juror had slept in the jury room, had received news information about the case during a break in deliberations, and had been approached by two women who tried to influence her. The foreman of the jury declined to answer, on the advice of his attorney, whether he had made up his mind prior to deliberations and whether he thought the case was nothing but a vendetta against Ford.

Following this investigation, the United States made a "Motion for Protection of the Integrity of the Jury Process," pointing out problems with the first trial and asking that precautions be taken to avoid the same problems in the second trial. The government proposed various alternatives, including a more detailed voir dire, sequestration of the jury, and transfer within the district. In the intervening period, the defendants moved for dismissal of the indictment on the grounds that there was no basis to declare a mistrial, and that retrial would violate the defendants' rights under the double jeopardy clause.

On April 10, 1991, the district court issued an order denying defendants' motion to dismiss the indictment on

double jeopardy grounds. In response to the government's motion, the district court directed that the selection of jurors would take place in Jackson, Tennessee, in the Eastern Division of the Western District. After the jurors were selected, however, the trial itself would resume in Memphis. From this order the defendants have appealed the propriety of the mistrial and Congressman Ford has filed a petition for a writ of mandamus seeking review of the district court's order to transfer jury selection to the Eastern Division.

II.

Defendants appeal the district court's denial of their motions to dismiss the indictment against them on the grounds of double jeopardy.[1] They assert that the district court's declaration of a mistrial over their objections was not supported by manifest necessity because the district court did not consider all the available alternatives prior to granting the mistrial.

This court reviews de novo a district court's denial of a motion to dismiss an indictment on the grounds of double jeopardy. *United States v. Goland*, 897 F.2d 405, 408 (9th Cir. 1990). In so doing, we look to the record of the initial trial. *United States v. Cameron*, No. 91-3447, slip op. at 2 (6th Cir. January 7, 1992).

---

[1] As an initial matter, we conclude that our jurisdiction is proper under 28 U.S.C. §1291. Although the district court's declaration of a mistrial and denial of the motion to dismiss the indictment is not a final judgment appealable under 28 U.S.C. § 1291, the Supreme Court has held that a denial of a defendant's motion to dismiss an indictment on double jeopardy grounds is "appealable as a 'collateral order' under 28 U.S.C. § 1291." *Richardson v. United States*, 468 U.S. 317, 320 (1984). Because a double jeopardy claim challenges "the very power of the Government to bring a person to trial," that "right would be significantly impaired if review were deferred until after trial." *Id.* Therefore, we may properly consider the merits of appellants' double jeopardy claims.

The Fifth Amendment prohibition against placing a defendant "twice in jeopardy" reflects a constitutional policy of finality for a defendant's benefit in all criminal proceedings. *See United States v. Jorn*, 400 U.S. 470 (1971) (plurality opinion). The Supreme Court has stated that the Double Jeopardy Clause grants a defendant the "valued right to have his trial completed by a particular tribunal." *Jorn*, 400 U.S. at 484. However, the Double Jeopardy Clause is not an absolute bar to retrial in every case. In some situations, a defendant's right to have his case resolved by a particular tribunal is subordinate to the larger interest of the public in "fair trials designed to end in just judgments." *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

When a mistrial is declared over the objections of the defendants, reprosecution is not barred where a "manifest necessity" exists to declare a mistrial in the initial prosecution. *United States v. Sanford*, 429 U.S. 14, 15-16 (1976) (per curiam). Manifest necessity has been defined as a "high degree" of necessity. *Arizona v. Washington*, 434 U.S. 497, 506 (1978). A determination of whether "manifest necessity" exists depends upon the facts of the particular case. *Jones v. Hogg*, 732 F.2d 53, 55 (6th Cir. 1984).

It is within a district court's sound discretion to declare a mistrial. *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824); *Hogg*, 732 F.2d at 56. A trial judge's decision to declare a mistrial when he considers the jury to be deadlocked is accorded great deference by a reviewing court since the trial court is in the best position to assess whether the jury can reach a just verdict if it continues to deliberate. *United States v. Jenkins*, 902 F.2d 459, 469 (6th Cir. 1990).

This court has set forth several factors which must be considered in determining whether a trial court abused its discretion in declaring a mistrial. These factors in-

clude: (1) a timely objection by the defendant, (2) the jury's collective opinion that it cannot agree on a verdict, (3) the length of the jury deliberations, (4) the length of the trial, (5) the complexity of the issues presented to the jury, (6) any proper communication which the judge has with the jury, (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict, and (8) the trial judge's belief that additional prosecutions will result in continued hung juries. *Hogg*, 732 F.2d at 56.

Defendants correctly point out that the district court is required to consider other possible alternatives before declaring a mistrial. *Id.* at 56, n.1. These included the option to give the jury an *Allen* charge and require it to further deliberate, to allow the jury to simply continue deliberating with eleven persons, to instruct the jury that it could bring a partial verdict as to any of the defendants, or to require the jury to keep deliberating until the transcripts it requested could be provided. The district court listened to defendants' arguments in favor of each of these alternatives and rejected each alternative. Because the refusal to declare a mistrial after the jury becomes deadlocked raises the possibility that the resultant verdict was coerced, a trial judge acts within his sound discretion in rejecting possible alternatives and granting a mistrial if reasonable judges could differ about the proper disposition. *Fay v. McCotter*, 765 F.2d 475, 478 (5th Cir. 1985).

Defendants argue that the trial court erred in not giving an *Allen* charge to the jury. However, the jury had deliberated for four days. This followed a trial lasting approximately twenty days. At the point in time that the district court rejected the *Allen* charge, the jury had twice indicated it was hopelessly deadlocked and unable to reach a verdict. The first indication of deadlock came two days earlier. On that occasion the trial judge told the jury that it was too early for them to declare a dead-

lock and sent the jury back for further deliberations. After two additional days of deliberations, the district judge was well within the bounds of its discretion in refusing to give the requested *Allen* charge because of the possibility of coercion. *United States v. Sawyers*, 902 F.2d 1217, 1220 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2895 (1991).

In addition, when the jury first indicated to the judge that it was deadlocked, it disclosed to the judge that the split in the jury was eight to four in favor of acquittal. Moreover, during deliberations one of the jurors was excused because she had falsely filled out the jury questionnaire and was ineligible to serve on the jury, and the trial judge heard evidence suggesting that there had been improper contact with the jury.

In *United States v. Lash*, 937 F.2d 1077 (6th Cir.), *cert. denied*, 112 S. Ct. 397 (1991), we upheld the giving of an *Allen* charge to the jury. We held that where the judge learned of the numerical split among the jury, but did not know whether the majority of the jurors favored conviction or acquittal, the *Allen* charge was not coercive where it instructed each side to reconsider its position. *Id.* at 1086. In this case, however, the district judge knew the numerical split as well as the fact that the majority favored acquittal. Moreover, the district judge had just excused one juror, and he would have given the *Allen* charge in an atmosphere where he had good reason to believe that improper contact with the jury had taken place. Given this situation, we conclude that the district judge did not abuse his discretion in refusing the *Allen* charge.

The defendants also argue that the district court could have given the jury an instruction, pursuant to Fed. R. Crim. P. 31(b), that it could return a partial verdict as to any of the individual defendants in this case. However, the record shows that after the jury announced for

the second time that it was deadlocked, the district court examined the jury's verdict forms at the request of all the defendants. These verdict forms showed that the jury had not reached a unanimous verdict as to any of the defendants or as to any of the charges. It was only at that point in time, after the district court was aware that the jury had not, in fact, reached any unanimous verdict as to any charge that the district court refused the requested instruction.

Moreover, as pointed out by the court at that time, its initial instructions to the jury did include an instruction that the jury could return a partial verdict. Before declaring a mistrial and dismissing a hung jury, a trial judge may inquire whether the jury has reached a partial verdict with respect to any of the defendants or any of the charges, but such an inquiry is not required where the trial judge has already given clear instructions on the point. *United States v. MacQueen*, 596 F.2d 76, 82 (2d Cir. 1979). "A trial judge is not obligated to repeat adequate instructions." *Id.* (citing *United States v. Bayer*, 331 U.S. 532, 536 (1947)). Accordingly, in light of the totality of the circumstances of this case, we hold that the district court did not abuse its sound discretion in refusing to give the supplemental instruction under Fed. R. Crim. P. 31(b).

Finally, defendants argue that the district court should have allowed the jury to continue its deliberations until it received the transcripts it requested and that it should have allowed the jury to deliberate with only eleven jurors. However, each of these proposed alternatives would have required the judge to send the jury back for further deliberations in an atmosphere which could have resulted in a coerced verdict. The transcripts would not have been available for two weeks. To force the jury to deliberate throughout that period would be inherently coercive. Likewise, an eleven member jury would have been subject to the same coercive influence that would have affected a

twelve member jury. Therefore, we believe that the district court did not abuse its sound discretion in ordering a mistrial in spite of these alternatives.

For the reasons stated, the district court was within its sound discretion in determining that "manifest necessity" was present for declaring a mistrial in this case. Since "manifest necessity" was present for the declaration of the mistrial, the Double Jeopardy Clause does not bar retrial of the defendants. Therefore, the district court did not err in denying the defendants' motion to dismiss the indictment against them.

III.

Petitioner Harold E. Ford seeks a writ of mandamus directing the district court to vacate its post-trial order directing that jury selection for the retrial take place in the Eastern Division of the Western District of Tennessee at Jackson. Petitioner also seeks review, in his petition for a writ of mandamus, of the propriety of the district court's decision to consider an FBI affidavit summarizing the investigation of juror misconduct during the first trial. For the reasons that follow, we hold that mandamus is not the appropriate procedure by which to remedy any errors which may have occurred in this case.

This court has the power to issue a writ of mandamus pursuant to the All Writs Statute, 28 U.S.C. § 1651. *See In re Benedectin Products Liability Litigation*, 749 F.2d 300, 303 (6th Cir. 1984). However, the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976). The writ "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its authority when it is its duty to do so.'" *Id.* (citing *Will v. United States*, 389 U.S. 90, 95 (1967)). Thus, only exceptional circumstances amounting to a "judicial usurpation of power"

will justify the invocation of this extreme remedy. *Id.* at 402.

As a means of implementing the rule that the writ will issue only in extraordinary circumstances, the courts have imposed two conditions which must precede its issuance. First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires." *Id.* at 403. Secondly, the petitioner must demonstrate that his right to issuance of the writ is "clear and indisputable." *Id.* The issuance of the writ lies within the discretion of the court to which the petition is addressed. *Id.*

Although a writ of mandamus should not generally be used to review the discretionary decisions of trial courts, *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245 (1964), the writ may be issued where the trial court's actions amount to a clear abuse of discretion. *Will*, 389 U.S. at 104; *Lemon v. Druffel*, 253 F.2d 680 (6th Cir.), *cert. denied*, 358 U.S. 821 (1958).

Petitioner argues that the district court's intradistrict transfer order is cognizable on mandamus because: (1) the district judge had no authority to transfer jury selection under Fed. R. Crim. P. 18; and (2) the transfer order, which was based on racial considerations, constituted an abuse of discretion. We do not believe that either of these reasons justify the extraordinary remedy of mandamus in the present case.

First, petitioner has not demonstrated that it was clear and indisputable that the district court lacked authority under Rule 18, to transfer the jury selection phase of the retrial to Jackson. We believe that the district court has the authority to order an intradistrict transfer in cases like the present one. *United States v. Balistrieri*, 778 F.2d 1226 (7th Cir. 1985), *cert. denied*, 477 U.S. 908 (1986); *United States v. Lewis*, 504 F.2d 92, 96-98 (6th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975).

Whether the district court properly ordered a transfer in this case is a matter addressed to the district court's discretion. We do not believe that petitioner has met his burden of showing that the district court's action amounted to a clear abuse of discretion or that the order was "clearly erroneous as a matter of law." *In re Benedectin*, 749 F.2d at 304.

Secondly, petitioner has wholly failed to demonstrate that he has no adequate alternative means of relief. Assuming that the retrial results in a verdict unfavorable to petitioner, we believe that his right to appeal from that final judgment will adequately safeguard petitioner's interests. At that time, petitioner can raise the issue of whether the district court abused its discretion in transferring the jury selection phase of his retrial to Jackson. We are unable to discern any extraordinary consequences which would flow from our requirement limiting petitioner to this normal avenue of relief, and therefore hold that the issuance of a writ of mandamus is not appropriate in the present case. Because the petitioner has failed to meet this two-part threshold requirement, we need not further consider the merits of the underlying dispute. Rather, those are matters which are best left to be resolved, if necessary, by the court on appeal.

Furthermore, we find that petitioner's challenge to the district court's reliance on an FBI affidavit concerning certain juror misconduct which occurred at the first trial is not properly before us on mandamus review. Mandamus review has been found to be an appropriate exception to the final judgment rule only where the issuance of the writ in aid of appellate jurisdiction "has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Kerr*, 426 U.S. at 402. "The writ cannot be issued to compel the court to decide a matter before it in a particular way," or to review judicial action taken in the exercise of

legitimate jurisdiction. *In re Rice*, 155 U.S. 396, 403 (1894); *In re Aetna Casualty Co.*, 919 F.2d 1136, 1140 (6th Cir. 1990). Because the district court had jurisdiction in this case, we are without authority to review the merits of its decision to consider the FBI affidavit under the guise of mandamus review. In the present posture of this proceeding, there is nothing we can direct the lower court to do, or not to do, as it has already acted. We therefore view petitioner's request as one which is cognizable only by a court on appeal. As such, petitioner should raise this issue, along with the others, on appeal after final judgment.

IV.

For the reasons set forth above, the district court's order denying defendants' motion to have the indictment against them dismissed on the ground of double jeopardy is AFFIRMED and the petition for a writ of mandamus is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Case No. 87-20193

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HAROLD E. FORD, DOUGLAS R. BEATY, KARL A. SCHLEDWITZ, and DAVID A. CRABTREE,
Defendants.

MEMORANDUM AND ORDER ON PENDING MOTIONS

[Filed Apr. 10, 1991]

Defendants' [*sic*] individually, or by joinder, filed the following motions in this case for resolution by this Court:

> Motion to dismiss the indictment because there was no manifest necessity for the declaration of a mistrial by the Court and, therefore, a retrial would violate the defendants' rights under the double jeopardy clause of the Constitution of the United States.
>
> Motion for judgment of acquittal. . .
>
> Motion to renew the motion for disclosure of the Grand Jury testimony of Special Agent Donald MacDonald, Federal Bureau of Investigation.

The government moved the Court for an order protecting the integrity of the jury selection process.

The Court rules on the motions in the sequence in which the motions are listed.

Manifest Necessity

It has long been established in the constitutional jurisprudence of this nation that a federal trial judge may discharge a jury before a verdict is reached, even over the objection of a defendant, where there is a manifest necessity for its declaration or if the ends of public justice would otherwise be defeated.

In 1824, 167 years ago, the Supreme Court of the United States ruled:

> We think that in all cases of this nature, the law has invested Courts of Justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all of the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.

United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

In 1971, the Supreme Court restated the important constitutional policy of finality in federal criminal trials:

> The Fifth Amendment's prohibition against placing a defendant twice in jeopardy represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings. A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And, society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness

> to limit the Government to a single proceeding to vindicate its very vital interest in enforcement of criminal laws.

United States v. Jorn, 91 S.Ct. 547, 554 (1971).

However, on pages 554 and 555 the Supreme Court stated an exception to this constitutional policy of finality in federal criminal cases:

> A defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

The Court declared a mistrial in this case and discharged the jury, over the defendants' objections, because of 1) manifest necessity and 2) the ends of public justice.

The graphic demonstration of manifest necessity is reflected by the following sequence of events which occurred in open court:

Wednesday afternoon, April 25, 1990, at 3:10 o'clock p.m., the Court received a note from Mr. H. O. Robinson, foreman of the jury. The Courtroom Deputy Clerk, Mrs. Ann Breaux, read the note to the Court and all attorneys:

> THE CLERK: This is the note from the jury:
>
> Judge Horton,
>
> We the jury have come to order and is now ready to return a verdict at 2:45.
>
> Thank you. J. Ruffin, Secretary.
>
> H.O. Robinson, Foreman.

(Tr. p. 40)

The Court thereupon requested the Deputy United States Marshal to invite the jurors to return to the courtroom whereupon the following transpired:

THE COURT: Marshal, have all of the jurors to take their seats and then have the foreperson come up here to the lectern.

(Jury present at 3:10 p.m.)

THE COURT: Mr. Robinson, would you go ahead and just read the jury's verdicts to all of us, please.

THE FOREMAN: All right, sir. Sir—

THE COURT: Yes, sir.

THE FOREMAN: David Crabtree on Counts One, Five, Six, Seven, and Eight—

THE COURT: Don't go too fast. David Crabtree—

THE FOREMEN: On, Five, Six, Seven and Eight, we have four guilty and eight not guilty.

THE COURT: Wait a minute. Is this the result of the jury vote?

THE FOREMAN: This is the result—let me say this at this time, at this particular time the jury is in a hopeless deadlock as far as coming back with a verdict.

THE COURT: Well, now that means that I need to have you sit down a minute and let me talk with the lawyers.

(Tr. p. 41)

Following extensive discussions with defense and prosecution attorneys, the Court addressed the foreman and jurors. The Court asked the jurors to return the following day and resume their deliberations:

THE COURT: Mr. Robinson and ladies and gentlemen, let me address a few comments to you. You were told during the course of the instructions on the law that jurors should reach unanimous verdicts if they can do so without violence to individual judgment. You might remember that expression. And there's an explanation that this means all twelve jurors must agree on a verdict.

Now what I heard Mr. Robinson say was that the jury is hopelessly deadlocked and that it is not possible in your judgment to return a unanimous verdict or verdicts in this case. Now is that what I heard you say?

THE FOREMAN: That is correct, sir. May I—

THE COURT: Now, wait, now, we have to be extremely careful at this point, that is why I have to talk with the lawyers first because there is only so much that I can say to you, and when I say 'you', I mean the whole jury, but I am addressing Mr. Robinson as the foreman.

In the court's judgment, after sitting on this bench right at ten years, it will be ten years May 12th, and after many, many, many, many trials, the court's judgment is that it is far too early for you to report that you are hopelessly deadlocked.

What the court is going to do is ask you to continue with your deliberations. This is a long case, many witnesses, many documents and it takes time.

I recognize that you set an adjournment schedule on the note that you said yesterday you would adjourn, I believe you said at 3:00, that's fine, we will respect that and if you wish to adjourn at this time, we will just lock up the room, put everything back, but we will ask you to come back and resume your deliberations at 9:30 tomorrow morning and we will be here. And as we told you before, there's no compulsion, you take the time you need, but you all have sat here, you have listened to the evidence, you have looked at the witnesses, you have seen and heard everything that went on in this court, you are intelligent people, you are one of the most attentive juries that we have ever had in this court. So I think that the court is justified in asking you to come back tomorrow and start again.

(Tr. 45, 46, 47)

Later, during the course of the following day, the Court received a note from the jury foreman, Mr. Robinson. The Court, referring to the note, stated:

> THE COURT: Well, here's a note from that same educated man saying simply. 'The majority of the jury has voted by secret ballot, nine to three, that it cannot reach a guilty or not guilty verdict without violence to individual judgment.' And he signed it.

(Tr. 164)

Following an extensive conference with the attorneys, the Court addressed the jury:

> THE COURT: Mr. Robinson, I read your note today as being as follows: 'Judge Horton, the majority of the jury has voted by secret ballot nine to three that it cannot reach a guilty or not guilty verdict without violence to individual judgment.'
>
> And you signed that note, is that correct?
>
> MR. ROBINSON: Yes, sir.
>
> THE COURT: Absolutely correct?
>
> MR. ROBINSON: Yes, sir.
>
> THE COURT: You've reached a deadlock?
>
> MR. ROBINSON: Yes, sir.
>
> THE COURT: And that's it?
>
> MR. ROBINSON: Yes, sir.
>
> THE COURT: If I ask y'all to deliberate further, do you think there is any hope of reaching a verdict in this case?
>
> MR. ROBINSON: No, sir.
>
> THE COURT: Hopelessly deadlocked?
>
> MR. ROBINSON: It is, sir.
>
> THE COURT: Absolutely?
>
> MR. ROBINSON: Absolutely.
>
> THE COURT: No question about it.
>
> MR. ROBINSON: No question.

THE COURT: Would I be wasting your time to ask you to deliberate further?

MR. ROBINSON: Yes, sir.

Again, the Court conferred with all attorneys and thereafter, out of an abundance of caution, addressed the jurors again.

THE COURT: Mr. Robinson, let me address you one more time. And don't think I'm worrying you to death, please don't think that.

I would ask you once again if in your judgment further deliberations by this jury in this case would be hopeless.

MR. ROBINSON: Yes, sir, I certainly feel that.

THE COURT: Now, let me ask your fellow jurors if they concur to just simply raise your right hand up as I've asked you to do many times before. All but three raised their hands. Apparently, we've got three nonconcurrences, it that correct? You didn't raise your hands.

MR. CLANCY: They didn't hear you.

THE COURT: All I was simply asking you is just whether you agree with what Mr. Robinson said, that's all, nothing more. Okay. All right, I just want to be sure.

And then I had asked you earlier also if further deliberations would be nothing more than a waste of time and you answered that.

MR. ROBINSON: Yes, I think so.

THE COURT: And I think I asked you finally if the words hopelessly deadlocked would be appropriate.

MR. ROBINSON: Those are appropriate words.

(Tr. 182, 183)

Absent the defendant's consent, when a judge believes that a jury is deadlocked, the most critical factor is the jury's own statement that it was unable to reach a ver-

dict. Therefore, before a judge declares a mistrial because of a deadlocked jury, he or she should question the jury, either collectively or individually, to determine whether further deliberation would be helpful. *United States v. Byrski*, 854 F.2d 955 (7th Cir. 1988).

This Court's inquiry of the jury exceeded by far the inquiry conducted by the trial judge in *United States v. Larry*, 536 F.2d 1149, 1151-1152 (6th Cir. 1976) wherein the following occurred:

> After responding to the questions presented by the jury, the court engaged the forelady in the following colloquy:
>
> > The Court: Now bearing those questions in mind I don't think that I have helped you much, if any, with the question you have asked because I feel satisfied that I am not permitted to any farther for fear of creating error. Is it your opinion, Madam Forelady, that you will be unable to reach a verdict?
> >
> > The Forelady: Yes it is.
> >
> > The Court: And that you are definitely at a deadlock?
> >
> > The Forelady: Yes sir. We seem to be.
> >
> > The Court: You seem to be?
> >
> > The Forelady: Yes.
> >
> > The Court: Do you think it would continue?
> >
> > The Forelady: We haven't made any headway at all.
> >
> > The Court: And has it been, whatever the situation, I don't want to know the numbers, has it been that way from the outset?
> >
> > The Forelady: Yes, sir.
> >
> > The Court: And hasn't changed.
> >
> > The Forelady: No, sir.
> >
> > The Court: Under the circumstances that here exist I do declare this to be a mistrial . . .

In *Larry*, as in this case, defense counsel complained of the trial judge's failure to compel the jury to deliberate further. The *Larry* Court stated at pp. 1153, 1154:

> As to the insistence upon a deadlocked jury being compelled to continue deliberations it has been said that such course of conduct more often than not defeats the ends of public justice; not only will such compulsion needlessly waste valuable judicial resources, it may coerce erroneous verdicts. (Citation omitted).

Defendants place substantial reliance upon the time the jury deliberated in this case. Jury deliberations in this case occurred over a period of 2-½ days. There is no minimum amount of time a jury must spend in deliberations before a mistrial can be declared. This factor is one which is best left to the determination of the trial judge who was most aware of the circumstances of the trial—*Arnold v. McCarthy*, 566 F.2d 1377, 1387 (9th Cir. 1978). This Court certainly did not act in an improvident manner. *United States v. Bridewell*, 664 F.2d 1050, 1051 (6th Cir. 1981).

The Court's decision to declare a mistrial in this case met the strict test stated by Justice Thurgood Marshall, dissenting in *Arizona v. Washington*, 98 S.Ct. 824, 840 (1978). Justice Marshall stated:

> What the manifest necessity doctrine does require, in my view, is that the record make clear that there were no meaningful and practical alternatives to a mistrial, or that the trial court scrupulously considered available alternatives and found all wanting but a termination of the proceedings.

Arizona, 98 S.Ct. at 840.

Ends of Public Justice

The Court's decision to declare a mistrial in this case was also supported by its considerations of the ends of

public justice. Juror misconduct permeated the trial of this case. Two selected jurors were excused from service on the jury by the Court, after extensive questioning, because of their failure during the jury selection process to answer truthfully questions bearing upon their qualifications to serve as jurors. There were strong indications of improper juror contact with outside persons during jury deliberations. Persons sympathetic to one or more defendants visited the courtroom and, throughout the trial, conducted themselves at times in a discourteous manner, obviously and blatantly attempting to influence the jury, despite the best efforts of the Court to discourage such misconduct. Defense counsel did virtually nothing to assist the Court in this effort. Subsequent interviews with discharged jurors by the FBI revealed evidence not only of possible juror misconduct, but also indicated that problematically two jurors were unwilling to follow the law—even though they had faithfully promised to do so during voir dire. One of the excused jurors indicated there was probably guilt on some counts but she could not vote guilty. One juror was reported asleep under the table in the jury room during deliberations. The jury foreman reported to the Court the jury had reached verdicts. Yet, when asked to read the verdicts, he read, before the Court stopped him, not verdicts but the divided vote of jurors on one defendant.

Considering these circumstances, it is clear to the Court the public's interest in a fair trial designed to end in a just judgment has not been served.

> The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree. Regardless of the sufficiency of the evidence at petitioner's first trial, he has no valid double jeopardy claim to prevent his retrial.

Richardson v. United States, 104 S.Ct. 3081, 3086, (1984).

Defendants' motion to dismiss the indictment on double jeopardy grounds as to all defendants are denied. The mistrial was dictated by reasons of 1) manifest necessity and 2) the ends of public justice.

Motion for Judgment of Acquittal

The Court will approach the various motions for judgment of acquittal by the defendants, and the government's opposition thereto, in the following way:

1) State *generally* the substance of the contentions of the parties as developed by the evidence in this case.

2) State *generally* the substance of the Court's findings and conclusions to the extent the Court deems appropriate to rule on the motions.

Contentions of the Government

It is generally the contention of the government that Butcher banks made a number of short term 60 to 90 day mostly unsecured phony cash loans in exchange for the Congressman's political influence. The government contends there was never any intent that Congressman Ford would repay these loans. The government contends that as Congressman Ford's political influence grew these loans increased in amount. To accomplish the plan that the loans not be repaid, the loans were rolled over into new notes which capitalized the interest, the effect being the creation of a current *not* past due note. The government contends these loans were shifted from one name to another and from one Butcher bank to another until the loans ended up buried in Southern Industrial Banking Corporation, a non-federally insured state licensed industrial loan and thrift company, more commonly called a finance company.

The government contends this banking procedure was followed as a means of getting money to Congressman

Ford and also as a means of hiding these loans from federal bank examiners as the loans moved through the federally insured Butcher banks. The government also contends loans were transferred without recourse.

The government contends that when loans to Congressman Ford exceeded $200,000.00 ($219,225.44) they became critical. At this point, C. H. Butcher, Jr. sought the services of Douglas R. Beaty, David A. Crabtree and Karl A. Schledwitz to find a way to handle this debt.

What was ultimately decided upon was a scheme to organize a Corporation under the laws of the State of Tennessee. The name decided upon was Tenn. Ford, Inc. The concept was that an attorney named Long would be hired to obtain a charter incorporating the entity and Southern Industrial Banking Corporation would make a loan to Tenn. Ford, Inc. The government contends the charter was obtained from the State of Tennessee. An unsecured loan in the amount of $350,000.00 was made to Tenn. Ford, Inc., and these funds were passed through this shell corporation to Karl A. Schledwitz, who deposited the funds into his Real Estate Account from which, working with Congressman Ford's CPA, Mr. Frank Banks, Congressman Ford's personal debts were paid.

The government contends that while the ostensible purpose of the loan was to pay the pressing obligations of the Ford funeral home, in fact, the money was used to pay off the personal debts of Congressman Ford. It is essentially the position of the government that this was a continuation of payoffs to Congressman Ford and Tenn-Ford, Inc. It was nothing but a shell corporation to funnel these funds to Congressman Ford for his personal benefit.

> The government contends that an agreement was reached to form Tenn-Ford, Inc. After the Charter of incorporation was obtained by Mr. Long, the attorney, not much else happened afterwards. In fact,

the attorney testified he contacted Mr. Beaty to find out whether he should proceed.

The government contends Tenn-Ford, Inc., obtained the $350,000.00 unsecured loan without any assets. There was no documentation. The note was signed by Doug Beaty as President.

The government contends efforts made by lower level bank employees to collect on the note were stopped. The loan was taken off the list of delinquent loans. When one of the bankers had a demand letter prepared, he was stopped and not allowed to send the letter.

The government contends when the Tenn-Ford loan was discussed with a bank examiner, C.H. Butcher, Jr. said he would take care of it.

The government contends the trustee in Bankruptcy had to obtain a judgment against Tenn-Ford, Inc., in his collection efforts. The trustee finally settled the $350,000.00 loan plus interest and costs for $25,000.00 after Congressman Ford gave a sworn affidavit which the government claims is false.

The government contends letters cited in the indictment were written and mailed in furtherance of the scheme to defraud.

Contentions of the Defendants

The defendants all deny this was an illegal transaction as contended by the government. The defendants all deny they entered into any conspiracy to defraud any Butcher bank. The defendants deny any conspiracy to commit the offense of mail fraud. They deny any conspiracy to obstruct in any way the Internal Revenue Service in its duty to assess and collect taxes. Defendants emphatically deny the existence of any conspiracy, bank fraud or mail fraud. In fact, the defendants all

claim the government's proof disproved any conspiracy, bank fraud or mail fraud.

Defendants claim Tenn-Ford., Inc., was a legitimate Tennessee Corporation and that the $350,000.00 loan was a legitimate business transaction. The defense claims the concept started out as a venture by C.H. Butcher, Jr. to obtain investors who would invest $350,000.00 in N. J. Ford and Sons Funeral Parlor, Inc., in Memphis, Tennessee, in exchange for 51% of the stock in that funeral home allegedly owned by Congressman Harold Ford. Somewhere along the way, the concept of the transaction changed from an investment concept to a loan concept, much to the surprise of Congressman Ford. When this disagreement surfaced, the deal eventually failed because of the collapse of the Butcher banks.

Conclusion

It is well established that a trial judge confronted with a Rule 29 motion for judgment of acquittal, Rule 29, Federal Rules of Criminal Procedure, must consider all of the evidence in a light most favorable to the government and grant the motion when it appears to the Court that the evidence is insufficient to sustain a conviction. The government must be given the benefit of all inferences which can reasonably be drawn from the evidence. It is not necessary that the evidence exclude every reasonable hypothesis except that of guilt. *United States v. Adamo*, 742 F.2d 927, 932 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 971 (1985).

The motion for judgment of acquittal must be granted when the evidence, viewed in the light most favorable to the government, is so scant that the jury could only speculate as to the defendant's guilt; and, is such that a reasonably-minded jury must have a reasonable doubt as to a defendant's guilt. *United States v. Beck*, 615 F.2d 441, 448, (7th Cir. 1980).

Applying this legal standard to the evidence in this case, as briefly sketched in this part of the Court's memorandum and order, it is obvious the Court can reach only one logical conclusion, that is, the motions for judgment of acquittal must be denied.

Douglas R. Beaty's Motion, Joined by Congressman Harold R. Ford and David A. Crabtree, To Renew His Request For Disclosure of Special Agent Donald MacDonald's Grand Jury Testimony

Defendant, Douglas R. Beaty, joined by Congressman Harold Ford and David A. Crabtree, filed a post-trial motion renewing his pretrial motion requesting the Court to order the disclosure of the grand jury testimony of Special Agent Donald MacDonald, Federal Bureau of Investigation. Mr. Beaty claims he has more than amply demonstrated that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. Fed. R. Crim. P. 6(e)(3)(c)(ii).

It is the contention of Mr. Beaty that the government, through the testimony of Special Agent MacDonald knowingly presented inaccurate, false and misleading information to the grand jury and thereby caused the grand jury to return the indictment against him and his co-defendants. Mr. Beaty claims the government knew a materially false factual premise existed with respect to Counts 9-19 of the indictment. Mr. Beaty contends the Court should reexamine the grand jury process to determine if the government presented materially false information to the grand jury. Mr. Beaty claims none of the 29 witnesses testifying for the government during the trial testified before the grand jury.

The government has consistently denied that it knowingly presented any false information to the indicting grand jury. The government states that Mr. Thomas DuVoisin, the liquidating trustee for Southern Industrial Banking Corporation, testified before a grand jury in

Memphis, Tennessee. Mr. C. H. Butcher, Jr., testified as long as the indicting grand jury wanted to hear him. This, the government contends, shows that Special Agent MacDonald was not the only witness to appear before the grand juries investigating this case. In addition, Mr. Dan Clancy, Assistant United States Attorney, stated the indictment in this case was approved at the highest levels of the Department of Justice in Washington, D.C.

Upon consideration of the motion, the Court concludes the same should be denied as to all defendants for the same reasons stated by the Court in its order filed September 1, 1989.

Mr. Beaty relies, in part, upon *U.S. v. Williams*, 899 F.2d 898 (10th Cir. 1990) which held that a prosecutor has a duty to present substantial exculpatory evidence discovered during an investigation by a grand jury. There is no basis upon which the Court can apply the *Williams* ruling to this case. This is because exhaustive hearings have been held on this issue and, upon the entire record, the Court cannot conclude that materially false information was knowingly presented to the grand jury by Special Agent MacDonald. As the Court stated in its September 1, 1989, ruling:

During the course of the hearings on these various motions, the government presented substantial documentary evidence to show that Special Agent MacDonald had conducted an extensive investigation into and performed an extensive document analysis in this case. The government's presentation was designed, in part, to refute the defense allegations that the indicting grand jury acted primarily on materially false information contained in the Bailey F.B.I. 302 statement. Substantial documentation was presented to show how the $350,000 Tenn-Ford funds were used. According to the government:

> So when the grand jury, when they heard Mr. MacDonald didn't hear a vacuum, here is what Mr. Beaty

> told him, this one statement. Mr. MacDonald also had available to him all of these documents, he had available to him his analysis, he had available to him interviews with other individuals, which, unless the Court tells me to, I am not going to name, there are other individuals in a position to know what had taken place as far as the trustee making the decision to settle with Congressman Ford for $25,000 on this $350,000 debt.
>
> Having shown your Honor what I have to offer that it would have been unbelievable for a grand jury not to have thought that there was some kind of fraud in this. (Tr. p. 96, March 18, 1988)

The Supreme Court of the United States ruled, in *Costello v. United States*:

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

Costello v. United States, 76 S.Ct. 406, 408-409 (1956). The Sixth Circuit has consistently given the *Costello* language a literal reading: "An indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for a trial of the charge on the merits." *Short, Id.* p. 182. In 1978, the Sixth Circuit stated:

> We are especially reluctant to see the trial of criminal cases further attenuated by preliminary trials concerning the adequacy of the grand jury proceedings, a concern particularly noted in *Costello.*

United States v. Barone, 584 F.2d 118 (6th Cir. 1978).

This issue was presented to the Court in the case of *United States of America v. Dana Kirk*, Case No. 86-20281 (W.D. Tenn). In that case, the Court stated:

> An indictment returned by a legally constituted and unbiased grand jury, if valid upon its face, is enough to call for trial of the charges on the merits. *Costello v. United States*, 76 S.Ct. 406 (1956); *United States v. Adamo*, 742 F.2d 927, 936 (6th Cir. 1984); *United States v. Short*, 671 F.2d 178 (6th Cir. 1982). The case law teaches that the word bias, as used in *Costello* refers to a grand jury which is predisposed in one way or another at the time of selection. Predisposition would exist if, for example, the cases to be considered by the grand jury involved minority group members or tax resistors and the prospective jurors were members of the Ku Klux Klan or posse Comitatus respectively. *Adamo* at 936.

The Court concludes the motion for disclosure of the grand jury testimony of Special Agent MacDonald should be and is hereby denied.

The motion of Douglas R. Beaty, joined by Congressman Harold Ford and David A. Crabtree, to renew his pre-trial motion requesting the disclosure of Special Agent Donald MacDonald's grand jury testimony is denied as to all defendants.

Motion For Protection of Integrity of the Jury Selection Process

Rule 18, Federal Rules of Criminal Procedure, entitled Place of Prosecution and trial, reads:

> Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

The Advisory Committee notes to Rule 18 cite case law supporting the proposition that there is no constitutional right to trial within a division of a district. Included in the notes is this provision:

> The Sixth Amendment provided that the defendant shall have the right to a trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . There is no constitutional right to trial within a division (citations omitted)

Wright, Federal Practice and Procedure: Criminal 2d § 305 (2d ed. 1982 & Supp. 1990), discussing place of trial, not only states that there is no constitutional right to trial within a division of a district, but that:

> There is now developing substantial authority for the proposition that the court, in exercising its discretion about fixing the place of trial, may take into account numerous factors appearing in the particular case.

Case law provides examples of factors illustrative of this principle for the Court's guidance. Publicity surrounding the trial is a factor, *United States v. Dickie*, 775 F.2d 607 (5th Cir. 1985). The mere fact that a defendant's home is nearer one trial site than another is insufficient to merit transfer, *United States v. Afflerbach*, 754 F.2d 866 (10th Cir. 1985). Adverse affect on the prompt administration of justice is a factor, *United States v. Raineri*, 670 F.2d 702 (7th Cir. 1982).

The Court finds the case of *United States v. Balistrieri*, 778 F.2d 1226 (7th Cir. 1985) to be significant in that

it provides the Court with a procedure appropriate for application in this case. In *Balistrieri*, the judge, *sua sponte*, entered an order directing jury selection for trial of a criminal case to be conducted in one division of the district and after selection of the jury moved the trial site to another division within the district. The Court, applying Rule 18, Federal Rules of Criminal Procedure, decided to move the jury selection part of the trial to the Green Bay Division of the Eastern District of Wisconsin and, after selection of the jury, moved the case to Milwaukee for the actual trial.

This procedure has also been recognized by the American Bar Association as being appropriate in high profile cases. In its "reports with recommendations to the house of delegates," 1991 Midyear Meeting, Seattle, Washington, February 11-12, 1991, the Section of Criminal Justice made the following recommendation in Standard 8-3.5 entitled Selecting the Jury:

> (d) Whenever it is determined that potentially prejudicial news coverage of a criminal matter has been intense and has been concentrated in a given locality in a state (or federal district), the court should in jurisdictions where permissible, consider drawing jurors from other localities in that state (or district).

Therefore, Rule 18 and case law interpreting Rule 18, and the American Bar Association recognize that in an appropriate high profile case, a trial judge can and may select a jury in one division of a district and proceed to trial or retrial of a criminal case in another division of the district.

The government moved the Court to order retrial of this case in another location within this district, presumably Jackson, Tennessee, which is located within the Eastern Division of the district. It is the government's contention that prejudicial publicity has so poisoned the well of jurors in this division as to make selection of an

impartial jury virtually impossible. Defendants unanimously oppose the government's motion to relocate the trial. Defendants claim their homes, friends, means of livelihood, offices, files and the added financial burden are factors which justify denial of the government's motion.

The Court will grant the defendants' motion to the extent that retrial of this case will be conducted in Memphis, Tennessee, for the convenience of the defendants, witnesses and the prompt administration of justice. However, the jurors selected to retry the case will be selected from among jurors qualified to serve who are on the jury rolls in the Eastern Division of the Western District of Tennessee. Jury selection (voir dire) will be conducted in the United States Courthouse, Jackson, Tennessee. The Court will schedule a hearing with all of the attorneys for the purpose of discussing dates, time and procedures to implement this decision. In addition, the Court will conduct discussions with appropriate court personnel and the United States Marshal to resolve logistical necessities required to carry out this decision.

Among the factors supporting the Court's decision to proceed in this manner are the following:

1) The initial trial of this case was covered day to day by an avalanche of television, radio and newspaper publicity. While this barrage of publicity could be seen, heard and read outside of the Western Division of this district, the publicity was primarily targeted to people living in the Memphis, Tennessee area.

2) There were strong indications of juror contact with outside persons or sources during the initial trial. Contact with or by jurors and outside person(s) or sources should be substantially minimized. This is because, in the Court's judgment, Eastern Division jurors will probably be, for the most part, generally unknown in Memphis, Tennessee.

3) Some persons attending the initial trial often expressed their displeasure with rulings by the Court vocally and/or with their feet. These persons often vocally expressed their support of the defense. The overall conduct of such persons was not only discourteous, but at times disorderly. Discourteous and disorderly conduct by persons attending the trial attempting to openly influence the jury should be of substantially less effect on jurors chosen from the Eastern Division of this district.

4) Two known jurors gave false and/or incomplete answers to questions asked of them during voir dire touching on their qualifications to serve as jurors.

5) After trial interviews with jurors by the FBI showed that possibly two jurors were unwilling to follow the law of the case—even after they faithfully promised to do so when questioned during the jury selection process. This type of conduct should not be a factor if jurors are selected from the Eastern Division of the district.

The Court thinks this procedure combined with intensive voir dire examination of prospective jurors will substantially aid the Court in the retrial of this case. It will be far less likely that jurors will be influenced by factors other than the evidence and the law that applies to that evidence.

The Court's greatest concern is that a properly selected unbiased and nonprejudiced jury will listen to the evidence in this case, listen to the law that applies to the case, deliberate with fellow jurors, and reach a fair and just decision based upon the evidence and the law, nothing more, nothing less.

ORDER

1. The motions to dismiss the indictment in this case on double jeopardy grounds are denied.

2. The motions for judgment of acquittal are denied.

3. The motions to renew the motions for disclosure of the grand jury testimony of Special Agent Donald MacDonald, FBI, are denied.

4. The motion for an order protecting the integrity of the jury selection process is granted in part and denied in part.

All of which is so ordered this 10 day of April, 1991.

/s/ Odell Horton
ODELL HORTON
Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 91-5497/91-5548

(91-5497)

IN RE: HAROLD E. FORD,
Petitioner,

v.

CHIEF JUDGE ODELL HORTON, *et al.*,
Respondents.

(91-5548)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HAROLD E. FORD, *et al.*,
Defendants-Appellants.

ORDER

[Filed Apr. 24, 1992]

BEFORE: MARTIN and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc,

the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 87-20193-H

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HAROLD E. FORD, *et al.*,
Defendants.

TRANSCRIPT OF PROCEEDINGS

September 27, 1990

* * * *

[81] THE COURT: That's really not at the core of what we are faced with here, Mr. McDaniels, as I see it. We have had trials involving very popular people. There was a trial here involving a Memphis State basketball coach, a very, very popular person. It was a lengthy trial, but we didn't have the kind of problems with the jury that we had in this case.

And it seems to me that the fundamental problem we have in this case is whether it is possible for a fair trial to be conducted in Memphis in this case. And this is fairness to both sides. And stripped to its bare bones, what we are talking about is whether a very popular black congressman and whether the government and these other things can receive a fair trial from a jury selected in Memphis where a large part of the population is minority.

And a—and a question of whether minority jury members are willing to be open minded and fair and consider the evidence in the case, the law that applies to that evi-

dence and follow the court's instructions. Now to me, I'm saying [82] me, not you, not the defense, not Mr. Clancy, to me this is a fundamental kind of inquiry given the experience that we have had with this jury.

In this case the court agrees that we would conduct and [*sic*] extensive voir dire, that we would do it all here in the courtroom, and that we would do it on an individual basis. And that the attorneys would be given the maximum leeway to participate in that voir dire. And that was done over a period of approximately two weeks.

The end result of this process was that we got jurors who faithfully promised to listen to the evidence, to follow the law, to abide by the court's instructions. The reality is some jurors did not do that, flagrantly disregarded the court's instructions, and made a mockery of justice in this courtroom.

Now it seems to me that talking about whether a popular person can get a fair trial or not does not get down to the issue that this court must face, and that is a question, is it possible—is it possible in Memphis Tennessee, given it's demographic makeup, for a fair jury to be selected and impaneled to try this case. That to me is where we've got to get down to and where this court has to make a decision. Now if I am wrong, you tell me.

MR. MCDANIELS: I reject the notion, I'm not suggesting that you have stated that isn't where you have [83] come out on this question, but I reject unequivocally the notion that in 1990, 1989 or whatever year we are in this case that black citizens in Memphis are incapable of judging fairly—

THE COURT: I didn't say they were incapable, I'm not speaking about their being incapable. I'm speaking in terms of whether there is a willingness, whether it just simply can be done.

Mr. Robinson is a very intelligent and capable man. That had nothing to do with what he ultimately did.

MR. MCDANIELS: You know—there has been a lot of taking the names in vain of a lot of people here. That is one of the objections that I have to this piece of paper, but whether you call it ability or willingness, I reject that black citizens in 1990—

THE COURT: Well, I'm not going to let any lawyer come in here and paint me with a brush and give the impression that I am sitting here saying that black people can't be fair. That gets out in the streets, the court has a problem, the court has a security problem, I get nasty telephone calls. I'm not saying that, and I'm not going to sit by and let you or any other lawyer interpret what I say in that way.

All I am saying is, is it possible. Willingness, intelligence, education, I'm not talking about that. Is it [84] possible in Memphis, given the current situation, for a fair jury to be selected to try this case. And I don't want to be misinterpreted, I've been silent too long in many of these instances. I've been nice too long, and the end result I'm a bad guy. Well, that goes with oath of office. I don't mind that. I accept that. But I at least want us to discuss the issues without misinterpreting what I'm saying.

* * * *

FILED
AUG 20 1992
OFFICE OF THE CLERK

No. 92-29

In the Supreme Court of the United States

OCTOBER TERM, 1992

HAROLD E. FORD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals abused its discretion by declining to issue a writ of mandamus barring the district court from selecting jurors from the Eastern Division of the Western District of Tennessee, which does not include Memphis, on account of juror misconduct at petitioner's first trial in Memphis, which is in another division of same judicial district, and on account of the publicity surrounding that trial, which was primarily targeted at residents of Memphis.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Humphrey v. *United States*, 896 F.2d 1066 (7th Cir.), cert. denied, 111 S. Ct. 342 (1990)	8
Kerr v. *United States District Court*, 426 U. S. 394 (1976)	8
Mallard v. *United States District Court*, 490 U.S. 296 (1989)	8
Platt v. *Minnesota Mining & Mfg. Co.*, 376 U. S. 240 (1964)	11
United States v. *Balistrieri*, 778 F.2d 1226 (7th Cir. 1985), cert. denied, 477 U.S. 908 (1986)	8, 9
United States v. *Cates*, 485 F.2d 26 (1st Cir. 1974)	9
United States v. *Clark*, 416 F.2d 63 (9th Cir. 1969)	8
United States v. *Gometz*, 730 F.2d 475 (7th Cir.), cert. denied, 469 U.S. 845 (1984)	9
United States v. *James*, 528 F.2d 999 (5th Cir.), cert. denied, 429 U.S. 959 (1976)	8
United States v. *Lewis*, 504 F.2d 92 (6th Cir. 1974), cert. denied, 421 U.S. 975 (1975)	8
United States v. *Mase*, 556 F.2d 671 (2d Cir. 1977), cert. denied, 435 U.S. 916 (1978)	8
United States v. *MacQueen*, 596 F.2d 76 (1979)	10
United States v. *Weddell*, 800 F.2d 1404 (5th Cir. 1986)	8
United States v. *Young*, 618 F.2d 1281 (8th Cir.), cert. denied, 449 U.S. 844 (1980)	8

Constitution, statute and rules: Page

U.S. Const. Amend. VI 8, 11
Jury Selection and Service Act of 1968, 28 U.S.C. 1861 ... 9
Fed. R. Crim. P.:
Rule 18 ..... 8, 11
Rule 21 ..... 2, 11
Fed. R. Evid. 606(b) 10

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-29

HAROLD E. FORD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is unpublished, but its judgment is noted at 958 F.2d 372 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1992. A petition for rehearing was denied on April 24, 1992. The petition for a writ of certiorari was filed on June 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Harold Ford is a black United States Congressman from the Memphis, Tennessee, area. In 1987, a grand jury sitting in the Eastern District of Tennessee charged Ford and the three other petitioners with conspiracy, mail fraud, and bank fraud. The indictment charged, among other things, that the Southern Industrial Banking Corporation had made a series of "loans" to Ford with no expectation of repayment. Pet. App. 2a; Gov't C.A. Br. 1.

The case was originally investigated by a grand jury sitting in Memphis, in the Western District of Tennessee, but it was presented to a grand jury in Knoxville, in the Eastern District of Tennessee, because the government maintained that venue on all of the charges properly lay in Knoxville. Following the indictment, Ford criticized the government's handling of the case. In particular, noting that he and two of his co-defendants were from Memphis, Ford criticized the government's decision to seek an indictment in Knoxville rather than in Memphis. Pet. App. 2a.

Pursuant to petitioners' motions, a federal magistrate transferred the case from Knoxville to Memphis in accordance with Fed. R. Crim. P. 21. After the case was transferred, the government filed a motion to have the case transferred outside of Memphis, but within the Western District of Tennessee, on the ground of prejudicial pretrial publicity. The district court denied the motion. The court expressed confidence that a fair trial could be had in Memphis despite the fact that Ford was a popular local figure and the case had generated substantial publicity in the Memphis area. Pet. App. 2a-3a.

2. The trial began on February 12, 1990. When the case was ready for closing arguments, one of the jurors failed to appear. The juror later appeared and explained

that he had been arrested the night before on a traffic charge. Further questioning revealed that the juror had failed to disclose at least one prior arrest on the jury questionnaire. The juror was excused, and an alternate juror was appointed. Pet. App. 3a; Gov't C.A. Br. 5-6.

On April 24, the case was submitted to the jury. The next day, the jury announced that it had reached a verdict. But when the jury appeared in open court, the foreman stated that the jury was deadlocked. The court ordered the jury to resume deliberations. On April 27, while the jury was still deliberating, the government informed the court that it had discovered that another juror had an undisclosed prior conviction. The jury adjourned early that day, but before leaving it sent a note to the court indicating that it had taken a vote and was still deadlocked. Pet. App. 3a-4a.

A hearing was held at which the juror named by the government admitted that she had failed to disclose two prior felonies on the jury questionnaire. The court dismissed the juror and then inquired into the jury's deadlock. The foreman said that the jury could not reach agreement. The court polled the jury, and all of the jurors agreed that they were deadlocked. The court then declared a mistrial. It cited the deadlock, the prior juror misconduct, and allegations of improper juror contact and attempts to influence the jury. Pet. App. 4a-5a.

After the mistrial, the FBI conducted an investigation of the allegations of juror misconduct. The affidavit of the special agent who conducted the investigation indicated that in addition to the problems associated with the two dismissed jurors, another juror had slept in the jury room, had received news information about the case during a break in deliberations, and had been approached by two women who tried to influence her. The jury foreman declined to answer whether he had made up his mind about the case prior to the deliberations, and also refused

to say whether he thought the case was the product of a vendetta against Ford. Pet. App. 5a.

3. At a hearing on September 27, 1990, the district court posed the question whether, in light of the publicity surrounding the first trial and the repeated instances of jury misconduct, petitioner would receive a fair trial from a jury selected from the Memphis area. Petitioner objected to the court's comments and accused it of implying that blacks in Memphis were incapable of judging the case fairly. The following exchange occurred:

> THE COURT: I didn't say they were incapable, I'm not speaking about their being incapable. I'm speaking in terms of whether there is a willingness, whether it just simply can be done.
>
> * * * * *
>
> MR. McDANIELS: You know—there has been a lot of taking the names in vain of a lot of people here. That is one of the objections that I have to this piece of paper, but whether you call it ability or willingness, I reject that black citizens in 1990 —
>
> THE COURT: Well, I'm not going to let any lawyer come in here and paint me with a brush and give the impression that I am sitting here saying that black people can't be fair. * * * I'm not saying that, and I'm not going to sit by and let you or any other lawyer interpret what I say in that way.
>
> All I am saying is, is it possible. Willingness, intelligence, education, I'm not talking about that. Is it possible in Memphis, given the current situation, for a fair jury to be selected to try this case. And I don't want to be misinterpreted, I've been silent too long in many of these instances. * * * But I at least want

> us to discuss the issues without misinterpreting what I'm saying.

Pet. App. 40a-42a.[1]

The government proposed, among other things, that the case be transferred within the district to avoid the effect of the publicity that had surrounded the first trial. On April 10, 1991, in response to the government's motion, the district court stated that the retrial would take place in Memphis, but it directed that jury selection take place in Jackson, in the Eastern Division of the Western District of Tennessee. The court gave five reasons for its decision:

> (1) The initial trial of this case was covered day to day by an avalanche of television, radio and newspaper publicity. While this barrage of publicity could be seen, heard and read outside of the Western Division of this district, the publicity was primarily targeted to people living in the Memphis, Tennessee area.
>
> (2) There were strong indications of juror contact with outside persons or sources during the initial trial. Contact with or by jurors and outside person(s) or sources should be substantially minimized. This is because, in the Court's judgment, Eastern Division jurors will probably be, for the most part, generally unknown in Memphis, Tennessee.
>
> (3) Some persons attending the initial trial often expressed their displeasure with rulings by the Court vocally and/or with their feet. These persons often vocally expressed their support of the defense. The overall conduct of such persons was not only dis-

[1] Judge Horton, a black man, has had a long and distinguished record supporting and advancing civil rights for blacks.

courteous but at times disorderly. Discourteous and disorderly conduct by persons attending the trial attempting to openly influence the jury should be of substantially less effect on jurors chosen from the Eastern Division of this district.

(4) Two known jurors gave false and/or incomplete answers to questions asked of them during voir dire touching on their qualifications to serve as jurors.

(5) After trial, interviews with jurors by the FBI showed that possibly two jurors were unwilling to follow the law of the case—even after they faithfully promised to do so when questioned during the jury selection process. This type of conduct should not be a factor if jurors are selected from the Eastern Division of the district.

Pet. App. 35a-37a. The district court also denied petitioners' motion to dismiss the indictment on double jeopardy grounds. *Id.* at 15a-25a.

4. Petitioner Harold Ford then sought a writ of mandamus from the court of appeals to compel the district court to conduct jury selection in Memphis. The court of appeals denied the request. Noting that mandamus is an extraordinary remedy, the court held that petitioner had not shown that the district court had abused its discretion by ordering the intradistrict transfer of the case for jury selection. The court stated further that petitioner had an alternative method of relief because he could raise the intradistrict transfer issue on appeal in the event of a conviction. The court also held that review by way of mandamus was not proper with respect to petitioner's claim that the district court improperly considered the FBI affidavit relating to the juror interviews, because the court of appeals could not order the district court to refrain from doing what it had already done. The court

added that petitioner's claim concerning the FBI affidavit could be raised on direct appeal if the second trial resulted in a conviction. Pet. App. 11a-14a.[2]

ARGUMENT

Petitioners contend that the court of appeals erred by declining to issue a writ of mandamus ordering the district court not to select the jury in the Eastern Division of the Western District of Tennessee. Review is not warranted at this time.

1. Petitioners' challenge to the court of appeals' decision is not ripe for review by this Court. As a consequence of the court of appeals' decision, the case will be tried on the merits. The decision of the court of appeals thus places petitioners in the same position they occupied when the district court granted the government's motion to conduct jury selection in the Eastern Division of the District instead of the Western Division. If petitioners are acquitted following a trial on the merits, their contention will be moot. If they are convicted and their convictions are affirmed on appeal, petitioners will be able to present their claims regarding the intradistrict transfer issue to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, there is no need for this Court to review the merits of petitioners' claim at this time.

2. a. The court of appeals did not abuse its discretion by declining to issue the writ of mandamus requested by petitioners. Mandamus is an extraordinary remedy that is appropriate only if a lower court has clearly abused its discretion or exceeded its authority. The petitioner

---

[2] The court of appeals also held that petitioners' retrial was not barred by double jeopardy, concluding that there was a manifest necessity for the declaration of a mistrial. Pet. App. 6a-11a. Petitioners do not challenge that ruling.

must have no other means of relief and he must show that he has a clear and undisputed right to the relief he seeks. See, *e.g.*, *Mallard* v. *United States District Court*, 490 U.S. 296, 308-309 (1989); *Kerr* v. *United States District Court*, 426 U.S. 394, 402-403 (1976). Petitioners in this case have another avenue of relief, since they may obtain review of the district court's ruling on appeal from a conviction. The court of appeals' decision not to issue a writ of mandamus therefore should not be disturbed.

In any event, petitioners have not demonstrated any right to the relief they seek, much less a clear and undisputed right. Although the Sixth Amendment requires a trial in the district in which the offense was committed, it does not require a trial in a particular division of the district. *Humphrey* v. *United States*, 896 F.2d 1066, 1068-1069 (7th Cir.), cert. denied, 111 S. Ct. 342 (1990); *United States* v. *Young*, 618 F.2d 1281, 1288 (8th Cir.), cert. denied, 449 U.S. 844 (1980). A district court does not violate Fed. R. Crim. P. 18, which requires a district court to fix the place for trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice, by ordering an intradistrict transfer of the case to avoid prejudicial publicity. See *Humphrey* v. *United States*, 896 F.2d at 1068-1069; *United States* v. *Weddell*, 800 F.2d 1404, 1406 (5th Cir. 1986); *United States* v. *Mase*, 556 F.2d 671, 675-676 (2d Cir. 1977), cert. denied, 435 U.S. 916 (1978); *United States* v. *James*, 528 F.2d 999, 1021-1022 (5th Cir.), cert. denied, 429 U.S. 959 (1976). That is particularly so after the first trial has ended in a hung jury. See *United States* v. *Lewis*, 504 F.2d 92, 96-99 (6th Cir. 1974), cert. denied, 421 U.S. 975 (1975); *United States* v. *Clark*, 416 F.2d 63, 64 (9th Cir. 1969). Thus, in *United States* v. *Balistrieri*, 778 F.2d 1226 (7th Cir. 1985), cert. denied, 477 U.S. 908 (1986), the court of appeals held that

the district court did not violate Fed. R. Crim. P. 18 by ordering the intradistrict transfer of the case for jury selection following extensive pretrial publicity in a related case. In *Balistrieri*, the court emphasized that the only inconvenience to the defendant was that the venire did not include jurors from the division in which the trial was being held, and it added that the jury was not required to be selected either from throughout the entire district or from the division in which the crime was committed. 778 F.2d at 1229.[3]

Petitioners' further argument, Pet. 18-24, that the district court improperly ordered the transfer because the judge believed that blacks in Memphis could not serve as fair and impartial jurors at the retrial is also meritless. The district court ordered the intradistrict transfer because of the extensive pretrial publicity, which was fo-

---

[3] Petitioners incorrectly contend, Pet. 17-18, that the intradistrict transfer order violated the Jury Selection and Service Act of 1968, which declares that "[i]t is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U.S.C. 1861. First, the policy declaration in Section 1861 does not provide an independent ground for relief. See *United States* v. *Gometz*, 730 F.2d 475, 479-480 (7th Cir.) (en banc), cert. denied, 469 U.S. 845 (1984). Second, the order at issue in this case does not offend the policy declared in Section 1861. The place within the district where the court convened was selected simply for the convenience of all the participants; the court could have moved the trial to the Eastern Division without violating any right of petitioners. Regardless of where the court chose to conduct the proceedings, the statutory purpose of having the jury drawn from a fair cross-section of an entire district or an entire division within a district would be satisfied in either case. The court in *United States* v. *Cates*, 485 F.2d 26 (1st Cir. 1974), did not hold to the contrary. The court in *Cates* simply held that the return of an indictment in a division different from the one in which the crime occurred did not violate the Act.

cused on Memphis, and on account of the repeated instances of juror misconduct at the first trial, not because of racial considerations. Contrary to petitioners' contention, the district court did not state that black jurors in Memphis would be incapable of judging the case fairly. Indeed, the district court specifically rejected the effort of counsel for Ford to construe the court's comments in that manner. In short, petitioners' argument that the court transferred the case for racial reasons is not supported by the record.[4]

b. Petitioners allege that various aspects of the court of appeals' decision in this case conflict with decisions of other circuits. There is no merit to those contentions. In this regard, it should be noted that petitioners make no claim that any court of appeals has held that it is improper to select a jury from another division within the same judicial district, and we are aware of no such case. Of course, petitioners cite no case supporting their contention that the issuance of a writ of mandamus is appropriate to overturn such an order.

---

[4] Petitioners contend, Pet. 24-25, that the district court's consideration of the FBI report concerning the instances of juror misconduct at the first trial violated Fed. R. Evid. 606(b). But Rule 606(b) provides that jurors may not testify with respect to certain matters regarding "the validity of a verdict," and the first jury returned no verdict. Contrary to petitioners' claim, the Second Circuit did not hold to the contrary in *United States* v. *MacQueen*, 596 F.2d 76 (1979). The court held in that case that it would not be proper to "impeach" a mistrial by concluding that "the jurors at the first trial had secretly acquitted [the defendant], though they announced in open court that they were deadlocked." *Id.* at 83. The government does not seek to "impeach" the mistrial that was declared following petitioners' initial trial. Moreover, the Second Circuit recognized that juror testimony regarding "impermissible outside influences" is permissible, *ibid.*, and the FBI investigation was directed in major part at determining whether any such outside contacts occurred.

Petitioners' contention, Pet. 25-26, that mandamus is proper to challenge the improper transfer of a case from one judicial district to another is beside the point. No interdistrict transfer is involved in this case. The jury selection and trial of petitioners' case will take place in the district where the offense occurred, thereby satisfying the venue requirements of both the Sixth Amendment and Fed. R. Crim. P. 18. Because petitioners have no right to a trial in any particular division of a district, they are not entitled to mandamus to challenge the intradistrict transfer of their case for jury selection.

Petitioners' reliance, Pet. 16-17, on this Court's decision in *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964), also is misplaced because that case did not involve an intradistrict transfer. Moreover, in *Platt*, after the court of appeals issued a writ of mandamus ordering an interdistrict transfer, this Court reversed, holding that the court of appeals had acted improperly by examining the issue de novo and exercising the discretion that Fed. R. Crim. P. 21 assigns the district court. 376 U.S. at 244-245.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS E. BOOTH
Attorney

AUGUST 1992

Supreme Court, U.S.
FILED
SEP 3 1992
OFFICE OF THE CLERK

No. 92-29

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HAROLD E. FORD, *et al.*,
Petitioners,

v.

UNITED STATES and
THE HONORABLE JUDGE ODELL HORTON,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

WILLIAM E. MCDANIELS *
PAUL MOGIN
THOMAS M. PATTON
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000
Counsel for Petitioner Harold E. Ford

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0C96 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
CONCLUSION	6

TABLE OF AUTHORITIES

CASES

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959)	5
Gillespie v. United States Steel Corp., 379 U.S. 148 (1964)	5
La Buy v. Howes Leather Co., 352 U.S. 249 (1957)	5
Land v. Dollar, 330 U.S. 731 (1947)	5
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)	5
Serfass v. United States, 420 U.S. 377 (1975)	
United States v. General Motors Corp., 323 U.S. 373 (1945)	5
United States v. Williams, 112 S. Ct. 1735 (1992)	5

STATUTES

Jury Selection and Service Act of 1968	3, 4
28 U.S.C. § 1861	3, 4
28 U.S.C. § 1866(c)	4

RULES

Fed. R. Crim. P. 18	3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-29

HAROLD E. FORD, *et al.*,
Petitioners,

v.

UNITED STATES and
THE HONORABLE JUDGE ODELL HORTON,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The reasons advanced by the government for denying certiorari cannot withstand scrutiny.

1. The government does not dispute that review by this Court would be warranted if the district court transferred jury selection from Memphis in reliance on a generalization that the black citizens of Memphis could not be fair jurors. Rather, it contends that the district court did not rely on such a generalization, and that counsel has misconstrued the district court's words. Br. Opp. 10. The court's words require no construction, however, and the government's attempt to recast the decision as one simply based on publicity and juror misconduct is unavailing.

In framing the issue to be decided, the district court repeatedly focused on race:

> And stripped to its bare bones, what we are talking about is whether *a very popular black congressman* and whether the government and these other things can receive a fair trial from a jury selected in Memphis *where a large part of the population is minority.*
>
> And a—and a question of whether *minority jury members* are willing to be open minded and fair and consider the evidence in the case, the law that applies to that evidence and follow the court's instructions.
>
> . . .
>
> . . . .
>
> Now it seems to me that talking about whether a popular person can get a fair trial or not does not get down to the issue that this court must face, and that is a question, is it possible—is it possible in Memphis Tennessee, *given it's demographic makeup,* for a fair jury to be selected and impaneled to try this case.

Pet. App. 40a-41a (emphasis added). The court's later statement that it was referring to the "willingness," and not to the capability, of black jurors to be fair, *id.* 41a, clarified the rationale for the court's generalization, but in no way changed its racial basis.

The references that were made to publicity and alleged juror misconduct do not change the fact that the court relied on a generalization about the attitude of the black citizens of Memphis. The record demonstrates that the concern of the government and the court was that publicity had made the black community of Memphis biased against the government. Similarly, the alleged juror misconduct was by some black members of the first jury. Since those individuals of course were not eligible to serve on the second jury, the only reason that the government and the court emphasized their alleged misconduct was that it purportedly demonstrated the bias of the black community against the government.

The record permits only one fair reading: the transfer was based on a conclusion by the district court that the black minority population of Memphis was not willing to be fair to the government in a trial of this popular black elected official. This is a race-based generalization that the Constitution simply does not tolerate, whether or not there is a purported basis for making such a generalization. *See* Pet. 22-23.

2. The government also argues that Fed. R. Crim. P. 18 allows intradistrict transfers to avoid prejudicial publicity. Br. Opp. 8. The government cites no case, however, in which a case has been transferred within a district solely to protect *the prosecution* from allegedly prejudicial publicity. A transfer to protect a defendant from prejudicial publicity is permissible under the language of Rule 18 allowing consideration of "the convenience of the defendant" and, in fact, may be required to protect a defendant's constitutional right to a fair trial, *see* Pet. 14 n.24. By contrast, a transfer to protect the prosecution from such publicity is permissible only on the view that the factors expressly enumerated in Rule 18 are not controlling. Such a view clearly was the basis for the transfer ruling here, for the district court ordered the transfer despite finding that the factors enumerated in the Rule required that the trial be in Memphis. Pet. App. 35a.

The question whether the factors listed in Rule 18 are controlling has produced a conflict among the courts of appeals. *See* Pet. 16. Given the central importance of this issue to the proper application of Rule 18 and the frequency with which federal courts are called upon to fix the place of trial within a district, the issue merits review by this Court.[1]

---

[1] The government contends that it is permissible under the Jury Selection and Service Act of 1968 to select the jury from one division and hold the trial in another division. Br. Opp. 9 n.3. It argues that 28 U.S.C. § 1861 does not provide an independent ground for relief, and that in any case the transfer here does not offend the

3. According to the government, the many cases recognizing that mandamus is available to review transfer orders are irrelevant because they involved interdistrict, not intradistrict, transfers. Br. Opp. 11. There is, however, no principled basis for permitting review of orders in the former category but not in the latter category.

The government also contends that mandamus is unavailable because "petitioners have no right to a trial in any particular division of a district." *Id.* What petitioners do have, however, is a right to have the place of the entire trial fixed based on the factors enumerated in Rule 18, rather than in disregard of those factors, *see* Pet. 16, and a right not to have the place of jury selection moved based on a generalization that violates the Constitution, *see id.* 21-23. Mandamus is a proper means of enforcing those rights.

4. The government maintains that the issues raised by petitioners are not "ripe" for review because petitioners

---

policy stated in § 1861 because the court could have moved the entire trial to the Eastern Division. Neither argument is sound. First, even if the declaration of policy in § 1861 does not provide an independent ground for relief, surely that declaration is entitled to great weight in interpreting the remainder of the Act, including the express provision in 28 U.S.C. § 1866(c) that, with certain exceptions not relevant here, "no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors." By its action in moving the place of jury selection to the Eastern Division, the district court improperly disqualified all residents of the Western Division from serving as jurors in a case to be tried in the Western Division. Second, given the district court's finding that "the convenience of the defendants, witnesses and the prompt administration of justice" dictated that the retrial be in the Western Division, Pet. App. 35a, the government is incorrect in asserting that the court could have moved the trial to the Eastern Division. That finding, and the mandatory language of the second sentence of Rule 18, would have made it improper for the court to move the trial to the Eastern Division. Finally, even if the court could have moved the trial to the Eastern Division, it does not follow that the Jury Selection and Service Act allows the court to "import" jurors from one division for a trial in another division.

may be acquitted at their retrial, in which case the issues they raise will be moot. Br. Opp. 7. That argument lacks merit, for this Court has often granted review in similar situations in which an issue raised in a petition for certiorari was important and was "fundamental to the further conduct of the case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 154 (1964); *see Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *see also United States v. Williams*, 112 S. Ct. 1735, 1738 (1992) (certiorari granted where court of appeals had affirmed dismissal of indictment without prejudice); *Serfass v. United States*, 420 U.S. 377, 383 (1975) (certiorari granted where court of appeals had rejected claim of double jeopardy and remanded for a new trial). Clearly, whether the jury for the retrial is to be drawn from outside the division where the trial is to be held is a matter "fundamental to the further conduct of the case." *Cf. Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) (certiorari granted to review denial of petition for mandamus seeking to set aside orders directing that issues would be tried to the court rather than to a jury); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 251 (1957) (certiorari granted to review writs of mandamus compelling district court to vacate orders referring cases for trial before a master).

BEST AVAILABLE COPY

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

WILLIAM E. MCDANIELS *
PAUL MOGIN
THOMAS M. PATTON
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000
Counsel for Petitioner
Harold E. Ford

* Counsel of Record